(4)

No. 96-6133

In The

Supreme Court of the United States

October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden,
Pontiac Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed September 27, 1996
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February, 1981 – Indictment filed in the Circuit Court of Cook County, Illinois, charging Petitioner, Roger Collins, and Murray Hooper with murder.

March 12, 1981 – Case assigned to Judge Thomas J. Maloney.

June 2, 1981 – Judge Maloney appoints Robert J. McDonnell to represent Petitioner.

July 22, 1981 – Joint jury trial of Petitioner and Roger Collins commences.

July 29, 1981 – Jury verdicts returned.

July 30, 1981 – Joint death penalty hearing commences.

July 31, 1981 – Jury verdicts imposing death penalty returned.

September 9, 1981 – Judge Maloney enters orders imposing sentences of death.

February 22, 1985 – Illinois Supreme Court affirms on direct appeal.

March 21, 1991 – Joint post-conviction petition filed by Petitioner and Roger Collins is dismissed.

July 20, 1992 – Illinois Supreme Court denies motion to stay proceedings pending outcome of Maloney indictment.

November 19, 1992 – Illinois Supreme Court affirms dismissal of post-conviction petition.

August 31, 1993 – Petitioner files Petition for Writ of Habeas Corpus in United States District Court, Northern District of Illinois.

January 27, 1994 – State files its Response to Petition for Writ of Habeas Corpus and Supporting Memorandum.

March 24, 1994 – Petitioner files Reply to State's Response and Supporting Memorandum.

April 8, 1994 – Oral argument held and matter taken under advisement by the District Court.

June 27, 1994 – Petitioner Roger Collins files Supplemental Motion for Discovery.

August 24, 1994 – District Court enters memorandum opinion and order granting Respondent's Motion to Dismiss the Petition, and denying Petitioner's Motion for Discovery and Roger Collins Supplemental Motion for Discovery. Judgment entered for Respondent.

September 8, 1994 – Petitioner files Motion to Amend Judgment.

November 4, 1994 – District Court enters order denying Motion to Amend Judgment.

December 2, 1994 – Petitioner files Notice of Appeal to the United States Court of Appeals for the Seventh Circuit.

December 6, 1994 – District Court enters order granting Petitioner's Motion for Certificate of Probable Cause.

December 30, 1994 – Court of Appeals orders this case consolidated with the appeal of Roger Collins for purposes of briefing and disposition.

November 29, 1995 – Oral argument heard and the Court of Appeals takes the matter under advisement.

April 12, 1996 – Court of Appeals issues opinion and order affirming the Decision of the District Court.

April 26, 1996 – Petitioner files Petition for Rehearing with Suggestion for Rehearing Enbanc.

June 26, 1996 – Court of Appeals enters order denying Petition for Rehearing with Suggestion for Rehearing Enbanc.

September 27, 1996 – Petitioner files Petition for Writ of Certiorari in the United States Supreme Court.

January 10, 1997 – United States Supreme Court enters order granting in part the Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America, ex rel. WILLIAM BRACY (A-01532), Petitioner,	)	No. 93C-5328
v.	)	
RICHARD GRAMLEY, Warden, Pontiac Correctional Center, Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS BY A STATE PRISONER UNDER SENTENCE OF DEATH

August 31, 1993

* * *

98. There is a reasonable probability that had the above referenced deficiencies not occurred, the results at the trial and sentencing would have been different. The Petitioner was thereby deprived of his right to effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

99. Some but not all of the above-cited instances of ineffective assistance of counsel were raised on direct appeal or on post conviction and decided against the

Petitioner. The failure to raise the unraised claims was due the ineffective assistance of appellate counsel and/or the failure of the State to appropriate any resources to enable the Petitioner to perfect his post conviction claims. The lack of resources included but are not limited to no money to pay post conviction counsel, and refusal of the trial court to appoint an investigator or subpoena witnesses.

X.

100. The trial judge, Thomas J. Maloney, was recently convicted in the U.S. District Court for the Northern District of Illinois of crimes related to taking bribes to fix criminal cases. In two or three separate incidents spanning a period of 1981 to 1986, Judge Maloney took money in return for rendering not guilty verdicts. According to The Chicago Tribune, the FBI investigation began in 1980.

101. Most of the discretionary rulings that Judge Maloney made in the Petitioner's trial were made in favor of the State and, at the time, Judge Maloney had a reputation for being a strict judge who was partial to "law and order". There is cause to believe that Judge Maloney's discretionary rulings in this case may have been influenced by a desire on his part to allay suspicion of his pattern of corruption and dishonesty.

102. The Petitioner was deprived of his right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

103. This claim was not raised on direct appeal or on state post conviction because, at the time, there was no means to discover the basis of the claim. The Petitioner's post conviction counsel did bring it to the attention of the Illinois Supreme Court by including it in his reply brief as soon as he became aware of Judge Maloney's indictment. However, the Illinois Supreme Court did not rule on the claim.

XI.

104. The penalty phase of the Petitioner's trial began on the day following the guilty verdicts. III RT 1430. The Petitioner's counsel moved for a continuance to prepare to rebut the Arizona evidence and to gather mitigation evidence and the motion was denied. *Id.* at 1425, 1439.

105. Had the Petitioner's trial counsel been given a reasonable continuance, he would have been able to call witnesses who would have testified that the Petitioner was in Chicago on December 31, 1980, the date of the Redmond/Phelps murders in Phoenix. These witnesses were Margaret Bracy, Kelly Bracy, Tony Salas, George "Sandy" Barren and Beatrice Mack.

* * *

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. WILLIAM BRACEY, Petitioner, vs. RICHARD GRAMLEY, Warden, Pontiac Correctional Center, Respondent.	)	No. 93 C 5328 The Honorable William T. Hart, Judge Presiding.

MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO PETITION FOR A WRIT OF HABEAS CORPUS

January 27, 1994

* * *

brought to the Illinois jury's attention at the death penalty sentencing hearing. Also alleged as error is the fact that counsel in the Illinois case did not present allegedly mitigating evidence concerning Petitioner's background. First, neither of these arguments was presented to the Illinois courts, and cannot now be presented here as a basis for issuance of the Writ of Habeas Corpus. *Spurlark, supra.* It should be noted here that counsel on Petitioner's direct appeal and post-conviction appeal was not the same counsel as represented Bracey at trial. Thus, nothing prevented these allegations from being made.

Moreover, the allegations deal with the calling of witnesses, a matter of strategy and tactics which will not properly serve as the basis of the contention or ineffectiveness under the *Strickland* standard.

As can be seen from the above, these arguments do not show ineffectiveness of either trial or appellate counsel. Therefore, they supply no ground for the granting of Habeas Corpus relief.

X.
(Paragraphs 100-103)

Petitioner asserts next that the recent conviction of the judge who presided over his trial for crimes related to taking bribes somehow should entitle Petitioner to relief. There is no indication at all that Petitioner attempted to bribe the judge. Rather Petitioner wishes this Court to draw the inference that he might not have received a fair trial since the judge, in an attempt to cover up his dishonest rulings in other cases, might have been too strict in his rulings as to defendant. The Illinois Supreme Court has twice scrutinized the record here and has affirmed Petitioner's convictions, sentence and dismissal of his Post-Conviction Petition. Such rampant speculation as is indulged in by Petitioner here certainly does not amount to any basis upon which to consider, let alone grant, habeas corpus relief.

Petitioner says that this argument was not ruled upon by the Illinois Supreme Court. This was because it was presented improperly as part of a reply brief, in which completely new allegations of error may not be

made. Moreover, Petitioner cannot present factual evidence for the first time on habeas when it was clearly in existence during state proceedings. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992). This does not concede, however, that Petitioner's baseless speculation even amounts to "evidence."

XI.
(Paragraphs 104-108)

Petitioner contends that he was prejudiced by the trial judge's denying him a lengthy continuance between the conviction and the beginning of the penalty stage of the trial. This argument was made before the Illinois Supreme Court and there rejected after full consideration. *People v. Collins, et al.*, 106 Ill. 2d 237, 280-282, 478 N.E.2d 267 (1985).

* * *

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. WILLIAM BRACEY,	)	
Petitioner,	)	No. 93 C 5328
v.	)	Honorable William T. Hart,
Richard Gramley, Warden, Pontiac Correctional Center,	)	Judge Presiding.
Respondent.	)	

PETITIONER'S REPLY TO THE STATE'S RESPONSE AND SUPPORTING MEMORANDUM OF LAW

March 24, 1994

* * *

beaten by the police, he lied when he said he said he heard shots, he lied when he said he saw Hooper at Roosevelt and Clark, he lied when he said that he saw the victims being led to the car in the parking lot, and he lied when he said that he saw Bracy in the possession of a shotgun. Nellum also stated that he was deliberately induced to commit perjury by Assistant State's Attorney Greg Owen, who was present at the time of Nellum's interrogation. This Court is required to assume that these facts are true in determining whether or not to grant Petitioner an evidentiary hearing. Also, the Petitioner has made the necessary showing of materiality under the standard for knowing use of perjury set forth in *United States v. Agurs, supra.* Given the central role that Nellum

played in the State's case, there is ample reason to believe that Nellum's false testimony could have affected the verdict, even if the false testimony only related to issues of credibility. *Napue v. Illinois, supra.* The Petitioner has therefor made the necessary showing with respect to this claim and is entitled to an evidentiary hearing.

V.

[Reply as to Claim X of Petition]

Petitioner Bracy was Denied His Due Process Right to a Fair Trial Before an Impartial Judge.

In April of 1993, the presiding judge at Petitioner's trial, Thomas J. Maloney, was convicted of extortion and racketeering charges following a jury trial in the United States District Court for the Northern District of Illinois. *United States v. Thomas J. Maloney, et al.*, No. 91 CR 477. (A copy of the indictment is attached as Exhibit 2 to this reply.) Petitioner has alleged that the evidence presented by the government in that trial – that from 1980 to 1986 Judge Maloney was engaged in an ongoing conspiracy involving the solicitation and acceptance of bribes to corruptly fix the outcome of criminal cases before him – establishes that petitioner was denied his due process right to an unbiased judge at his 1981 trial and capital sentencing hearing.

In its response, the State does not dispute that Judge Maloney took bribes to fix criminal cases and that this corrupt activity was occurring at the time of Petitioner's trial. The State instead asserts that since there is no allegation of bribery in Petitioner's case, his claim of the denial of an impartial judge is "rampant speculation"

which provides no basis for federal relief. (Bracy Response at 25-26) Initially, it must be stressed that all of the facts bearing on this issue are not before the court as Petitioner does not have a transcript of Judge Maloney's trial and has not yet received the assistance of the court to investigate this claim.[1] Petitioner is thus seeking discovery and an evidentiary hearing to fully develop the facts bearing on his allegation of judicial bias; and contrary to the State's argument, the uncontested allegations presently before this court concerning Judge Maloney's corrupt practices are sufficient to require a hearing. (see supra, p. 21-22)

A basic component of due process of law is the right to a trial before an unbiased judge, *Dyas v. Lockhart*, 705 F. 2d 993, 995 (8th Cir. 1983), and this right is so fundamental that " . . . not even the appearance of bias is tolerated." *Daye v. Attorney General of New York*, 696 F. 2d 186, 196 (2nd Cir. 1982). To determine whether this right has been violated in particular circumstances, the United States Supreme Court has stated that the test is whether the situation is one " . . . which would offer a possible temptation to the average man as a judge to . . . lead him not to hold the balance nice, clear and true between the

[1] For example, in addition to the five cases alleged in the indictment, the government also presented testimony that Judge Maloney received $2500 to fix the case of *People v. Wilfredo Rosario*, a murder prosecution. In that case the money was received in 1980, and after later suppressing the defendant's confession, Maloney acquitted him in mid-1981. (See Exhibit 3) Moreover, Petitioner believes that the government also elicited testimony to the effect that defendants who did not pay bribes to Maloney received adverse rulings.

State and the accused. . . . " *Ward v. Monroeville*, 409 U.S. 57, 60 (1972), quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Applying this standard here, Judge Maloney's situation was clearly one in which there would be the "possible temptation" for him not to be impartial between the State and Mr. Bracy when making his numerous discretionary rulings at Petitioner's trial and capital sentencing hearing. Judge Maloney's bribe-taking scheme motivated him to rule in favor of the State in cases such as Petitioner's, where no bribe was involved, in order [sic] divert suspicion from his corrupt practices. Moreover, in applying the test for whether a particular situation creates the probability of judicial bias, the petitioner's case is unique. Normally, in evaluating such claims a reviewing court must " . . . presume the honesty and integrity of those serving as judges." *Dyas v. Lockhart*, 705 F. 2d 993, 997 (8th Cir. 1983). The instant case involves a judge who has been proven to be corrupt and who therefore would not scruple at succumbing to the temptation to abandon his impartiality in favor of the State in order to further and protect his illicit activities. Petitioner's trial before such a judge does not "satisfy the appearance of justice," *In re Murchison*, 349 U. S. 133, 136 (1955), and violated his right to due process of law.

Finally, the State asserts that the evidence underlying this claim cannot be presented for the first time on habeas because "it was clearly in existence during state proceedings". (Bracy Response at 26) This assertion is incorrect, as the evidence of Judge Maloney's corrupt activities was not available to Petitioner until well after his state post-conviction proceedings ended.

The Illinois Supreme Court affirmed the dismissal of Bracy's post-conviction petition on November 19, 1992. Judge Maloney's trial and conviction, upon which Bracy's due process claim is based, did not occur until 1993. The State's apparent suggestion that this claim has been procedurally defaulted is therefore without merit. A showing that the factual basis of a claim was not reasonably available to counsel during the state court proceedings constitutes cause for an alleged default, *Murray v. Carrier*, 477 U.S. 478, 488 (1986), *Lewis v. Lane*, 832 F. 2d 1446,1456-1457 (7th. Cir. 1987); and, as discussed above, petitioner's allegation that he was denied a trial before an impartial judge, if true, establishes the prejudice necessary to entitle him to federal review as such a trial is fundamentally unfair. See *Rose v. Clark*, 478 U.S. 570, 577 (1986).

VI.

[Reply as to Claims IV and XIV of Petition]

The Petitioner Was Deprived of a Fair Trial and Was Improperly Sentenced to Death Because of the Comments of the Assistant State's Attorneys in Final Argument.

A. Facts

In the course of his initial summation, Assistant State's Attorney Greg Owen argued as follows:

> Do you think Lawrence Hyman came in and lied for me and Goggin? Do you think O'Callaghan lied for us? Do you think an attorney would put his license on the line for the likes of these two, Collins and Bracy? There is no way. We go to school too long for that, to get up and perjure

> ourselves for those two guys, or against those two guys. (3 RT 1285).

At a later point in his summation, Mr. Owen argued as follows:

> The gun's in the lake; when Morris Nellum was on the witness stand he was cross-examined about the guns and he told you that he did in fact lie to the police. He said, 'yes, I lied, I told the police I didn't know where the guns were.' And you also heard that I interviewed Nellum a few hours later. Did you hear any questions about what Nellum told me about the guns? Did you hear anything about that at all? Did any lawyer for the defense ask that question? You see, I can't. That is improper for me, but they didn't because they didn't want to hear that. (3 RT 1288).

• • •

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 91 CR 477
v.	)	Violations: Title 18,
THOMAS J. MALONEY, ROBERT MCGEE and WILLIAM A. SWANO	)	United States Code, Sections 1503, 1951, 1962(c) and (d) SUPERSEDING INDICTMENT

COUNT ONE

(Filed Jun. 25, 1991)

The SPECIAL OCTOBER 1990-1 GRAND JURY charges:

1. At the times material to this indictment:

a. There were in force and effect criminal statutes of the State of Illinois involving bribery, including Illinois Revised Statutes, Chapter 38, Sections 33-1(a)-(e), the violation of which was punishable by imprisonment for more than one year. Chapter 38, Sections 33-1(a)-(d) provided as follows:

33-1 Bribery

§33-1. Bribery. A person commits bribery when:

(a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or

tenders to that person any property or personal advantage which he is not authorized by law to accept; or (b) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to one whom he believes to be a public officer, public employee, juror or witness, any property or personal advantage which a public officer, public employee, juror or witness would not be authorized by law to accept; or (c) With intent to cause any person to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or (d) He receives, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness;

Prior to January 1, 1986, Chapter 38, Section 33-1(e) provided as follows:

§33-1. Bribery. A person commits bribery when: . . .

(e) He solicits any property or personal advantage which he is not authorized by law to accept pursuant to an understanding that he shall influence the performance of

> any act related to the employment or function of any public officer, public employee, juror or witness.

At all times since January 1, 1986, Chapter 38, Section 33-1(e) provided as follows:

> §33-1. Bribery. A person commits bribery when:
>
> (e) He solicits, receives, retains, or agrees to accept any property or personal advantage pursuant to an understanding that he shall improperly influence or attempt to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness.

b. There was in force and effect a criminal statute of the State of Illinois that prohibited conspiracy to commit an offense, including conspiracy to commit bribery, the violation of which was punishable by imprisonment for more than one year. Illinois Revised Statutes, Chapter 38, Section 8-2, provided in pertinent part that:

> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

c. There was in force and effect a federal obstruction of justice statute, Title 18, United States Code, Section 1503, that prohibited endeavors to influence, obstruct, or impede the due administration of justice.

d. There was in force and effect a federal statute, Title 18, United States Code, Section 1951, that prohibited conspiracy to commit extortion and extortion, extortion that affected interstate commerce under color of official right.

2. At the times material to this indictment:

a. The Circuit Court of Cook County was a governmental body authorized and empowered under the Constitution and laws of the State of Illinois to hear and decide various legal actions and proceedings arising in the County of Cook in the State of Illinois.

b. The Circuit Court of Cook County was an "enterprise," the activities of which affected interstate commerce as that term is defined in Title 18, United States Code, Section 1961(4).

c. The Criminal Division of the Circuit Court of Cook County was responsible for hearing criminal cases arising in Cook County.

d. Defendant THOMAS J. MALONEY was a judge of the Criminal Division with responsibility for hearing and deciding criminal cases that were assigned to him, and was a person associated with and employed by the Circuit Court of Cook County, the "enterprise" described in subparagraph 2(b) above.

e. Defendant ROBERT MCGEE was an attorney licensed to practice in Illinois, and was a person associated with the Circuit Court of Cook County, the "enterprise" described in subparagraph 2(b) above.

f. Defendant WILLLIAM A. SWANO was an attorney licensed to practice in Illinois, and was a person

associated with the Circuit Court of Cook County, the "enterprise" described in subparagraph 2(b) above.

g. Among the cases assigned to defendant THOMAS J. MALONEY were *People of the State of Illinois v. Lenny Chow et al.*, 81 C 4020, a case charging murder in which the defendants were acquitted by defendant THOMAS J. MALONEY in a bench trial in August 1981; *People of the State of Illinois v. Owen Jones*, 81 C 9832, a case charging murder in which the defendant was convicted of voluntary manslaughter and sentenced to 9 years' incarceration by defendant THOMAS J. MALONEY in 1982; *People of the State of Illinois v. Ronald Roby*, 82 I 50244, a case charging theft, forgery, deceptive practices, and unlawful use of credit cards in which the defendant was granted three years' probation by defendant THOMAS J. MALONEY in September 1982; *People of the State of Illinois v. Frank Calistro*, 82 C 8355, a case charging aggravated battery in which the defendant was sentenced to probation by defendant THOMAS J. MALONEY in January 1983; and *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, a case charging murder in which the defendants were convicted by defendant THOMAS J. MALONEY in a bench trial in June 1986.

3. Beginning in approximately 1980 and continuing until approximately July 1990, in the Northern District of Illinois, Eastern Division,

THOMAS J. MALONEY and
ROBERT MCGEE,

defendants herein, being persons associated with the enterprise described in paragraph 2 above, did knowingly conspire and agree, together with others known and

unknown to the Grand Jury, to conduct and participate in the conduct of the affairs of that enterprise, directly and indirectly, through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961(5), said racketeering activity consisting of multiple acts involving bribery under Illinois law, and obstruction of justice and extortion under federal law, as set forth and charged in Count Two of this indictment as Racketeering Acts Numbers 1 through 6.

a. It was part of the conspiracy that defendant THOMAS J. MALONEY abused his position as a judge of the Circuit Court of Cook County by conspiring, soliciting, receiving, retaining, and agreeing to accept money to "fix," that is, corruptly determine issues of fact and/or law, and agree to fix the results in criminal felony cases pending before him.

b. It was part of the conspiracy that defendant ROBERT MCGEE conspired, solicited, obtained, received, and retained, on behalf of and at the direction of defendant THOMAS J. MALONEY, money from attorneys, including defendant WILLIAM A. SWANO and others, for the purpose of corruptly fixing and agreeing to fix the results in criminal felony cases pending before defendant THOMAS J. MALONEY, and acted as a conduit or "bagman" for defendant THOMAS J. MALONEY in passing said money to defendant THOMAS J. MALONEY.

c. It was further part of the conspiracy that in 1981, defendant THOMAS J. MALONEY received money, from persons known and unknown to the Grand Jury, to pay for the fixing of the murder charges in *People of the State of Illinois v. Lenny Chow, et al.*, 81 C 4020, in order to

assure the acquittal of the defendants charged in that case.

d. It was further part of the conspiracy that in 1982, defendant THOMAS J. MALONEY agreed to receive money from defendant WILLIAM A. SWANO to pay for the fixing of the murder charges in *People of the State of Illinois v. Owen Jones*, 81 C 9832, in order to assure that the defendant charged in that case would be acquitted of the murder charged and be found guilty of the lesser charge of voluntary manslaughter.

e. It was further part of the conspiracy that in 1982, defendant WILLIAM A. SWANO gave bribe money to defendant ROBERT McGEE, who was acting as a conduit and "bagman" for defendant THOMAS J. MALONEY, in order to assure that the defendant in *People of the State of Illinois v. Owen Jones*, 81 C 9832, would be convicted of voluntary manslaughter rather than murder, and would be sentenced to 9 years' imprisonment.

f. It was further part of the conspiracy that in 1982, defendant THOMAS J. MALONEY, pursuant to the corrupt agreement with WILLIAM A. SWANO, acquitted Owen Jones of murder, convicted him of the lesser crime of voluntary manslaughter, and sentenced him to 9 years' imprisonment, pursuant to the agreement between THOMAS J. MALONEY and WILLIAM A. SWANO to fix Owen Jones' case for the payment of money.

g. It was further part of the conspiracy that in approximately the summer of 1982, defendant THOMAS J. MALONEY agreed to receive money from attorney WILLIAM A. SWANO in connection with the case of *People of the State of Illinois v. Ronald Roby*, 82 I 50244, in

order to assure that the defendant would receive a sentence of probation in that case.

h. It was further part of the conspiracy that in approximately August 1982, WILLIAM A. SWANO paid money to an intermediary or "bagman" for defendant THOMAS J. MALONEY in order to fix the defendant's sentence in *People of the State of Illinois v. Ronald Roby*, 82 I 50244.

i. It was further part of the conspiracy that on September 3, 1982, defendant THOMAS J. MALONEY sentenced Ronald Roby to a term of three years' probation, pursuant to the agreement between defendant THOMAS J. MALONEY and defendant WILLIAM A. SWANO to fix Ronald Roby's sentence in exchange for the payment of money.

j. It was further part of the conspiracy that in 1982, defendant THOMAS J. MALONEY agreed to receive money from defendant WILLIAM A. SWANO in connection with the aggravated battery charges in *People of the State of Illinois v. Frank Calistro*, 82 C 8355, in order to assure that the defendant charged in that case received a sentence of probation.

k. It was further part of the conspiracy that in approximately December 1982 or early January 1983, defendant WILLIAM A. SWANO gave bribe money to defendant ROBERT McGEE, who was acting as a conduit and "bagman" for defendant THOMAS J. MALONEY, in order to assure that the defendant in *People of the State of Illinois v. Frank Calistro*, 82 C 8355, would receive a sentence of probation on charges of aggravated battery.

l. It was further part of the conspiracy that on January 12, 1983, defendant THOMAS J. MALONEY sentenced Frank Calistro to probation, pursuant to the agreement between defendant THOMAS J. MALONEY and defendant WILLIAM A. SWANO to fix Frank Calistro's sentence for the payment of money.

m. It was further part of the conspiracy that between approximately January 1986 and June 27, 1986, defendant THOMAS J. MALONEY conspired and agreed to receive $10,000 to pay for the fixing of the murder charges in *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, in order to assure the acquittal of the defendants charged in that case.

n. It was further part of the conspiracy that on June 17, 1986, defendant ROBERT MCGEE, acting as a "bagman" and conduit for defendant THOMAS J. MALONEY, received $10,000 from defendant WILLIAM A. SWANO to pay for the fixing of the murder charges in *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, pursuant to an agreement that defendant THOMAS J. MALONEY would acquit the defendants charged in that case in a bench trial.

o. It was further part of the conspiracy that during the trial of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, defendants THOMAS J. MALONEY and ROBERT MCGEE discussed with defendant WILLIAM A. SWANO the ongoing nature of the bribe and the continued retention of the approximate $10,000 paid to fix the case, and defendant THOMAS J. MALONEY agreed to retain the $10,000 bribe money until such time as defendant WILLIAM A.

SWANO presented evidence which would make it appear plausible for defendant THOMAS J. MALONEY to enter a judgment of acquittal in the case.

p. It was further part of the conspiracy that on June 27, 1986, after the conclusion of the evidence in the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, defendant THOMAS J. MALONEY returned the $10,000 he had received and retained to fix the case to defendant WILLIAM A. SWANO in order to cover up and conceal original payments of the bribe, and entered a judgment of guilty against the defendants.

q. It was further part of the conspiracy that in approximately the summer of 1989, defendant THOMAS J. MALONEY approached defendant WILLIAM A. SWANO after defendant THOMAS J. MALONEY and WILLIAM A. SWANO knew that their activities in connection with the aborted fix of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, were under active investigation by federal law enforcement authorities, and THOMAS J. MALONEY told defendant WILLIAM A. SWANO to refuse to cooperate with the federal investigation and that defendant THOMAS J. MALONEY offered to arrange for an attorney to represent defendant WILLIAM A. SWANO in connection with the investigation.

r. It was further part of the conspiracy that in approximately June or July 1990, defendant THOMAS J. MALONEY had a conversation with defendant WILLIAM A. SWANO in which defendant THOMAS J. MALONEY again told defendant WILLIAM A. SWANO to refuse to

cooperate with the federal investigation, and offered to arrange for an attorney to represent defendant WILLIAM A. SWANO in connection with the investigation.

s. It was further part of the conspiracy that defendant THOMAS J. MALONEY took steps to hide and conceal from the Internal Revenue Service and other law enforcement agencies the bribe money he received to corruptly fix felony criminal cases.

t. It was further part of the conspiracy that the conspirators would conceal, misrepresent, and hide, and cause to be concealed, misrepresented, and hidden, the existence, purpose, and acts done in furtherance of the conspiracy;

All in violation of Title 18, United States Code, Section 1962(d).

COUNT TWO

The SPECIAL OCTOBER 1990-1 GRAND JURY further charges:

1. The Grand Jury realleges and incorporates by reference paragraphs 1 and 2 of Count One of this indictment.

2. From in or about 1980 until in or about July 1990, at Chicago and elsewhere, in the Northern District of Illinois,

THOMAS J. MALONEY,
ROBERT MCGEE, and
WILLIAM A. SWANO,

defendants herein, being persons associated with the enterprise described in paragraph 2 of Count One, did knowingly conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961, which racketeering activity consisted of multiple acts involving bribery and conspiracy to commit bribery under Illinois law, and extortion and obstruction of justice under federal law. Specifically, the pattern of racketeering activity engaged in by defendants THOMAS J. MALONEY, ROBERT MCGEE, and WILLIAM A. SWANO consisted of the following acts:

RACKETEERING ACT NUMBER 1

In or about 1981, in Chicago, defendant THOMAS J. MALONEY solicited, received, retained, and agreed to accept money which he was not authorized by law to accept, knowing that such money was promised and tendered with the intent to cause him to influence the performance of an act related to his employment as a public officer, namely, to corruptly fix and agree to fix the outcome of the trial of *People of the State of Illinois v. Lenny Chow et al*, 80 C 4020, by acquitting the defendants charged in that case; in violation of Illinois Revised Statutes, Chapter 38, Section 33l(d) and (e).

RACKETEERING ACT NUMBER 2

In or about 1982, in Chicago, defendant THOMAS J. MALONEY solicited, received, retained, and agreed to accept money which he was not authorized by law to

accept, knowing that such money was promised and tendered with the intent to cause him to influence the performance of an act related to his employment as a public officer, namely, to corruptly fix and agree to fix the defendant's sentence in *People of the State of Illinois v. Ronald Roby*, 82 I 50244, by sentencing the defendant to a period of probation; in violation of Illinois Revised Statutes, Chapter 38, Section 33-1(d) and (e).

RACKETEERING ACT NUMBER 3

In or about 1982, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY and ROBERT McGEE solicited, received, retained, and agreed to accept money from defendant WILLIAM A. SWANO pursuant to an understanding that they would improperly influence or attempt to influence the performance of an act related to the employment or function of a public officer, that is, the defendant THOMAS J. MALONEY would corruptly fix the outcome of the case of *People of the State of Illinois v. Owen Jones*, 81 C 9832, by acquitting the defendant of murder, convicting him of the less serious charge of voluntary manslaughter, and sentencing him to 9 years imprisonment in exchange for a bribe of money; in violation of Illinois Revised Statutes, Chapter 38, Section 33l(c), (d), and (e).

RACKETEERING ACT NUMBER 4

In or about late 1982 and early 1983, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY and ROBERT McGEE solicited, received, retained, and agreed to accept money from WILLIAM A.

SWANO pursuant to an understanding that they would improperly influence or attempt to influence the performance of an act related to the employment or function of a public officer, that is, that defendant THOMAS J. MALONEY would corruptly fix the defendant's sentence in the case of *People of the State of Illinois v. Frank Calistro*, 82 C 8355, by sentencing the defendant to probation on charges of aggravated battery in exchange for a bribe of money; in violation of Illinois Revised Statutes, Chapter 38, Sections 33-1(c), (d), and (e).

RACKETEERING ACT NUMBER 5

In or about 1986, in Chicago, defendants THOMAS J. MALONEY and ROBERT MCGEE, and WILLIAM A. SWANO together with others known and unknown to the grand jury, did commit and cause to be committed bribery, in violation of the Illinois Bribery Act, Illinois Revised Statutes, Chapter 38, Section 33-1; conspiracy to commit bribery, in violation of Illinois Revised Statutes, Chapter 38, Section 8-2; and conspiracy to commit extortion and extortion under federal law, in violation of Title 18, United States Code, Section 1951; in that defendants THOMAS J. MALONEY, ROBERT MCGEE, and WILLIAM A. SWANO did commit the following acts, any of which alone constitutes Racketeering Act 5:

(A) From in or about January 1986 to on or about June 27, 1986, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY, ROBERT MCGEE, and WILLIAM A. SWANO and others known and unknown to the grand jury, did knowingly and intentionally conspire and agree to solicit, receive, retain, and

agree to accept approximately $10,000 pursuant to an understanding that they would improperly influence and attempt to influence the performance of an act related to the employment and function of a public officer, and committed an act in furtherance thereof; that is, that defendant ROBERT MCGEE would obtain approximately $10,000 from defendant WILLIAM A. SWANO and transmit it to defendant THOMAS J. MALONEY in order that defendant THOMAS J. MALONEY would corruptly fix the outcome of the case of the *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, by acquitting the defendants of murder in exchange for the $10,000 bribe; in violation of Illinois Revised Statutes, Chapter 38, Sections 8-2 and 33-1(d) and (e).

(B) Between on or about June 17, 1986 and June 27, 1986, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY and ROBERT MCGEE solicited, received, retained, and agreed to accept from defendant WILLIAM A. SWANO approximately $10,000 pursuant to an understanding that they would improperly influence or attempt to influence the performance of an act related to the employment or function of a public: officer, that is, that defendant THOMAS J. MALONEY would corruptly fix the outcome of the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, by acquitting the defendants of murder in exchange for the $10,000 bribe; in violation of Illinois Revised Statutes, Chapter 38, Section 33-1(d) and (e).

(C) From in or about January, 1986 to June 27, 1986, defendants THOMAS J. MALONEY and ROBERT MCGEE did knowingly, willfully, and unlawfully combine, conspire, confederate and agree together and with each other

to commit extortion, which extortion would obstruct, delay, and affect commerce, as "extortion" and "commerce" are defined in Title 18, United States Code, Section 1951, in that they agreed among themselves to obtain approximately $10,000 from persons known to the grand jury, with their consent, such consent being induced under color of official right, in order to corruptly fix the outcome of the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555; in violation of Title 18, United States Code, Section 1951.

RACKETEERING ACT NUMBER 6

In or about 1989 and 1990, in Chicago, in the Northern District of Illinois, defendant THOMAS J. MALONEY did endeavor to obstruct the due administration of justice, in violation of Title 18, United States Code, Section 1503, in that defendant THOMAS J. MALONEY did commit the following acts, any one of which alone constitute racketeering Act Number 6:

(A) In or about the summer of 1989, in Chicago, defendant THOMAS J. MALONEY endeavored to obstruct the due administration of justice by instructing WILLIAM A. SWANO that he should refuse to cooperate in an ongoing federal investigation of bribery, and attempted bribery and extortion regarding the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, and by offering to provide WILLIAM A. SWANO with an attorney to represent him in that investigation; in violation of Title 18, United States Code, Section 1503;

(B) In or about June or July 1990, in Chicago, defendant THOMAS J. MALONEY endeavored to obstruct the due administration of justice by instructing WILLIAM A. SWANO that he should refuse to cooperate in an ongoing federal investigation of bribery, and attempted bribery, and extortion regarding the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, and by offering to provide WILLIAM A. SWANO with an attorney to represent him in that investigation; in violation of Title 18, United States Code, Section 1503;

All in violation of Title 18, United States Code, Section 1962(c).

COUNT THREE

The SPECIAL OCTOBER 1990-1 GRAND JURY further charges:

1. The GRAND JURY realleges and incorporates by reference paragraphs 1, 2, and 3 of Count One of this indictment.

2. From in or about January 1986 to June 27, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

THOMAS J. MALONEY,
ROBERT McGEE and
WILLIAM A. SWANO,

defendants herein, together with others known and unknown to the GRAND JURY, did knowingly, willfully, and unlawfully combine, conspire, confederate, and agree together and with each other to commit extortion, which extortion would obstruct, delay, and affect commerce, as

"extortion" and "commerce" are defined in Title 18, United States Code, Section 1951, in that they agreed among themselves to obtain $10,000 from persons known to the grand jury with their consent, such consent being induced under color of official right, in order to corruptly fix the outcome of the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555; in violation of Title 18, United States Code, Section 1951.

3. It was part of the conspiracy that on June 17, 1986, defendant ROBERT McGEE received $10,000 from WILLIAM A. SWANO on behalf of defendant THOMAS J. MALONEY in order for THOMAS J. MALONEY to fix the case.

4. It was part of the conspiracy that THOMAS J. MALONEY retained the $10,000 bribe until June 27, 1986, with intent to corruptly fix the case by acquitting Earl Hawkins and Nathson Fields of murder.

5. It was part of the conspiracy that on June 27, 1986, defendant THOMAS J. MALONEY returned the $10,000 bribe to WILLIAM A. SWANO in order to conceal and cover up the fact that THOMAS J. MALONEY had agreed to fix the murder case charged against Earl Hawkins and Nathson Fields;

All in violation of Title 18, United States Code, Section 1951.

COUNT FOUR

The SPECIAL OCTOBER 1990-1 GRAND JURY further charges:

1. The GRAND JURY realleges and incorporates by reference Count One of this indictment.

2. From in and about the summer of 1989 to in and about late June or early July 1990, at Chicago, in the Northern District of Illinois, Eastern Division,

THOMAS J. MALONEY,

defendant herein corruptly endeavored to obstruct the due administration of justice by instructing WILLIAM A. SWANO that he should refuse to cooperate in an ongoing federal investigation of bribery, attempted bribery, and extortion regarding the case of *People of the State of Illinois v. Earl Hawkins and Nathson Field*, 85 C 6555, and by offering to provide WILLIAM A. SWANO with an attorney to represent him in that investigation;

In violation of Title 18, United States Code, Section 1503.

A TRUE BILL:

/s/ Joan B. Donel
FOREPERSON

/s/ Fred Foreman
UNITED STATES ATTORNEY

FIRST SUPERSEDING INDICTMENT

No. 91-CR 477

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

THE UNITED STATES OF AMERICA

vs.

WILLIAM A. SWANO,
ROBERT B. McGEE and
THOMAS J. MALONEY

INDICTMENT

Violations: Title 18,
United States Code,
Sections 1503, 1951,
1962(c) and (d)

A true-bill,

/s/ Jean B. Daniel
Foreman

Filed in open court this 26th day of June, A.D. 1991

/s/ G. Stuart Cunningham
Clerk
By William A. Haynes

Bail, $ _____

EXHIBIT 3

24 (N) CHICAGO SUN-TIMES, WEDNESDAY, MARCH 24, 1993

Witness Couldn't Believe Cases Were Being Fixed

By Rosalind Rossi
Staff Writer

When a deputy sheriff first said he could help fix a case before former Criminal Court Judge Thomas J. Maloney, attorney William Swano didn't believe it, he testified Tuesday.

"I said, 'I find that hard to believe,' " Swano, 46, said during Maloney's trial on charges of fixing five cases as a Criminal Court judge. "Judge Maloney was so prosecution-oriented. . . . I wanted to hear it from the horse's mouth."

So, Swano said, Deputy Sheriff Lucius Robinson agreed to set up a meeting. Within a week, Swano said, he and Robinson met Maloney in a hallway outside Maloney's courtroom and Swano popped the question to Maloney:

"I said, 'Lucius said you can help me with this case up here. Is that right?' . . . He [Maloney] said, (He's my guy. Deal with him.' "

As Maloney stood by, Swano said, he gave Robinson a pre-arranged sum of $2,000 to fix a murder case against Swano's client, Wilfredo Rosario. Swano said he gave Robinson a final $500 payment on Oct. 17, 1980.

About two months later, Swano said, Maloney "nullified the state's case" against Rosario by throwing out

Rosario's confession. Five months after that, he said, Maloney acquitted Rosario after a bench trial.

Swano, 35, was describing his first allegedly corrupt experience with the judge as the government's key witness against Maloney, 67, now retired, and attorney Robert McGee, 51, who is accused of acting as Maloney's "bagman" in three cases. Defense attorneys contend that Swano is trying to "save his hide" and cannot be believed.

Swano indicated he was so confident of one fix he had arranged in a murder case before Maloney that he bet the prosecutor, Richard Stock, $5 he could win a voluntary manslaughter conviction. He won the bet.

Swano, a former assistant public defender and member of the office's murder task force, said he went into private practice in 1979. That year, he said, he talked to Robinson, who had a reputation as "the bagman" for Judge Maurice Pompey, then sitting in a preliminary hearing court for murder and sex cases.

One day, Swano said, he was telling Robinson about a client charged with a date rape when Robinson "asked me if I wanted some insurance." At first, he said, he did not understand what Robinson meant, but then realized Robinson was offering to fix the case.

"I asked him what the premium was. . . . He said '$200.' . . . I told him I'd meet him out in the hallway." There, Swano said, he paid Robinson $200 and Pompey threw out the charges. It was his first fix.

In 1982, Swano said, he paid Robinson $2,000 to win a "highly unusual" probation and work release sentence

from Maloney in the case of Ronald Roby, charged with five felonies involving credit card fraud.

Also in 1982, Swano said, he started to fix a murder case with Robinson, but McGee approached him and said Maloney thought Lucius was "too hot" and wanted McGee as his intermediary. Said Swano: "I was happy. I found it more comfortable to deal with a lawyer than a sheriff, especially a lawyer who had a friendship . . . with the judge."

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel ROGER COLLINS,	)	93 C 5282
Petitioner,	)	93 C 5328
v.	)	Chicago, IL
GEORGE WELBORN, Warden, Menard Correctional Center,	)	April 8, 1994 10:00 a.m.
Respondent	)	Hearing

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. HART

* * *

[7] BY MR. EBERHARDT:

over 150 witnesses, many of them being gang members, were brought before the federal grand jury.

After those 150 members were brought before the grand jury, that is when all of a sudden there was this triple homicide under the viaduct at Clark and Roosevelt, and the Marquette 10, one of the drug dealers was killed after he had appeared before the federal grand jury.

Do we know that in fact there is a link at this point?

No.

Is it incumbent upon us to check to see if there is a link?

Yes, it is incumbent upon us to do that because Mr. Collins is actually innocent of the charges.

We know that somebody committed those crimes. We feel that either the federal government or some branch of the state government has information that has not been provided that would help us in determining the issues here.

The Greylord and the Gambat investigations of Judge Maloney, I think it has been made perfectly clear, it has been made perfectly clear at least to me after speaking to one of the attorneys involved and one of the witnesses involved in the Maloney prosecution, the thrust of the government in their case against former Judge Maloney was he was known as a hard-hitting prosecution-oriented judge unless [8] he got paid, and what he did is that he made sure that all the calls, all the discretionary calls, everything went in favor of the State unless he got paid. That obviously was to the detriment of Roger Collins when he looked at the discretionary rulings of Thomas Maloney that were made in this case.

Was there potentially some overreaching on the part of the prosecutor's office?

What we found and what I suggest is interesting to the court that might talk about or might give some insight into their motivations; on February 21st of 1981, the arrest occurred and the prosecution.

On February 23rd of 1981, witnesses were brought before the grand jury, and on February 25th, 1981, in the Chicago Tribune, Mr. Daley announced the formation of the gang crimes prosecution unit with Mr. Owen being placed in charge.

Now, this occurs after a homicide that occurred in November of 1980, the fact that everything ground to a screeching halt after witnesses were brought to the polygraph examiner's office after police thought that other people were involved based on the results of the polygraph examinations, and then all of a sudden in January the FBI steps into the Arizona prosecution and all of a sudden in February we have the arrest of Mr. Collins, Mr. Bracy, Hooper

* * *

[58] BY MR. LEVY:

exhaustion would be futile because it is time barred, and if you would, I think it would be better to explore that a little bit further with my co-counsel, Mr. Carlson. He is more familiar with the Illinois post-conviction statute than I am, but it is our position that it is not – it is not subject to an exhaustion requirement because exhaustion would be futile.

Moving on to the Judge Maloney issue, it is uncontroverted that at this point, based upon Judge Maloney's conviction in this court, that Judge Maloney was engaged in a pattern of corruption which began prior to the time that he sat as the trial judge in the Bracy and Collins matter.

The issue is whether or not there is prejudice as opposing counsel correctly points out in his reply papers.

We are not conceding that we would have to show prejudice, but assuming that we do, we would like some additional opportunity to demonstrate that the pattern of corruption in which Judge Maloney was engaged

impacted his judicial behavior not only in the cases where he got bribes but also in the cases where he didn't get bribes.

Counsel for Mr. Collins has suggested to you one way in which it might have affected his behavior in these other cases. Another possible suggestion was he was extra tough in the cases where he didn't get bribes as kind of advertising, sort of the idea that if you don't pay me then I [59] am going to really come down on your client.

At this point, Judge Hart, we are obviously not in a position to prove that, but we believe that with some reasonable opportunity to investigate we may be able to, and at this point we just haven't had the opportunity to investigate.

What would we do?

We would want to look at the transcript from Judge Maloney's trial. We might want an opportunity to interview or depose some of those persons and witnesses who were most intimately associated with Judge Maloney who may be able to provide material information on his behavior in the cases where he didn't get bribes.

We would like to do an analysis of Judge Maloney's rulings, or a pattern of Judge Maloney's rulings to see how he exercised his judicial discretion in a large number of cases that were assigned to him to see if there is any noticeable or discernable patterns.

We don't want to go on a wild goose chase, your Honor, we don't want to reinvestigate Judge Maloney from square one. We believe that most of that information

has been assembled and is in existence as part of the presently-pending prosecution in this court, and if we could simply be given some reasonable access to those materials, we may well be able to make the showing of prejudice that possibly we may [60] need to make in order to connect up the pattern of corruption with Judge Maloney's behavior in this particular case.

In summary, the ruling that we are asking from you today with respect to the Nellum recantation and Judge Maloney claims is we are asking you to rule that these claims are not defaulted, that you do have jurisdiction to hear these claims, and that you give us some reasonable additional opportunity to investigate these claims. What we would propose to do in connection with the investigation issue is to try and provide to the court an expeditious and economical discovery plan which within a reasonable period of time would give us the opportunity to provide the additional information to this court.

That is my presentation, unless you have any questions.

THE COURT: No, sir.

Thank you.

I think what I will do is break until 1:30, just an hour, and then we will get back at it at 1:30.

MR. LEVY: Thanks very much.

(Court recessed to 1:30 p.m. of the same day, 4/8/94.)

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[62] THE CLERK: 93 C 5282, Collins v. Welborn.

THE COURT: All right, we will resume.

MR. CARLSON: For the record again, I am Martin Carlson on behalf of Mr. Bracy.

I would like to begin with the point Mr. Levy made about the court's question about shouldn't we be back at state court on the Maloney claim and the Nellum claim.

The problem with that is that we don't believe we have a viable state court remedy at this point in view of the Illinois statute of limitations for post-conviction petitions. Originally it was within ten years of the date of conviction. It has been amended and is currently three years following the date of conviction or six months following the denial of certiorari of the direct appeal.

Obviously the information we are relying on in the Judge Maloney and Morris Nellum issues was discovered well after the applicable period would have run as to Mr. Collins and Mr. Bracy.

I would note to the court the case of Harris v. DeRobertis. I don't believe it has been cited in any of the briefs, but at 932 F.2d 619 in which the 7th Circuit noted the fact that while there is a savings provision of the statute of limitations saying that an untimely petition may be allowed if the petitioner can show no culpable negligence. The court of appeals noted that that provision has almost [63] never been successfully invoked, and in DeRobertis – or Harris, they held that they will not find available state remedies and will not send a petitioner back to state court unless there is direct precedence from the state courts that on those facts they would in fact waive the limitations period.

In any event, we believe that our case, there was already one petition filed. Illinois also has a presumption against successor post-conviction petitions, so we feel we really don't have an adequate state remedy as to those issues at this point and they are properly before this court.

As Mr. Levy pointed out, as to those two issues we feel there is no procedural default problem because we can show cause by virtue of the fact that the claim was not reasonably available to us until –

THE COURT: Why wasn't it available?

MR. CARLSON: Well, the evidence on which we are relying, Judge Maloney's conviction, and the evidence that came out there didn't become public until I believe it was April or early '93 and the post-conviction appeal in the Illinois Supreme Court was concluded before that information became public.

Mr. Echeles did try to get before the Illinois Supreme Court the fact that he had been indicted, that Judge [64] Maloney had been indicted. The court denied his motion to stay the proceedings and refused to allow him to supplement the record with any information concerning Judge Maloney.

Of course, the indictment itself would not have established the claim because at that point in time Judge Maloney was contesting all the allegations and we don't believe that until the evidence came out at his trial that the evidence existed for us to present the current claim.

THE COURT: As far as you know, however, there is nothing that came out of this trial that directly connects to this case – or is there?

MR. CARLSON: As far as we know, but, again, we are asking for a chance to review the transcript of that proceeding.

Similarly the Morris Nellum claim, the recantations – he was not located and did not begin making his recantations until well after the post-conviction petition in the trial court had been dismissed. Again, Mr. Echeles tried to raise that in the Illinois Supreme Court by way of a motion to stay the proceedings. This was after his opening brief had been filed and after the State had filed their briefs. It was really untimely under Illinois appellate procedure, so that was also not an adequate opportunity to raise it in the state courts.

I want to address several other issues that we

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[93] BY MR. ZICK:

up with these guns at the last minute, I can't understand – I was confused as to what would have been the purpose of suddenly dumping those guns in late June or early July for finding when it was in fact the woman's gun. She testified at trial that Bracy told her that the gun had been used in a crime and then disposed of. He said the river. Maybe he said the lake. Maybe she misheard. She did testify to a body of water, was the final resting place for that gun.

Moving on to Mr. Levy's presentation, the Nellum recantation that he is attempting to present before the

court, we point out quite clearly U.S. ex rel. Miller v. Pate, recantation testimony, of course, should be judged very harshly, should be very seldom a basis for habeas relief, it should be viewed with great suspicion. This man has sat on one version of the facts now for over a decade and suddenly is coming forward. I think that should be judged and given the weight it deserves, which is exactly none.

Again, the 1992 statement that he obtained from Mr. Nellum, that, of course, falls under that Keeney v. Tamayo-Reyes bar. This is a new fact-finding that was not in existence at the time of the state court proceedings but it could have been and as such, it is simply barred for habeas review at this point.

As to Judge Maloney and his criminal case that was pending at the time, I think it is worth bearing in mind [94] that the petitioners had not been able to, and you brought this out in a question yourself, had not been able to link one unfavorable ruling or favorable ruling or anything. All we have here is a general smear campaign. This judge was later convicted. It happened at about this time or while this trial was going on apparently. He was accepting bribes in some criminal cases. We don't have anything more concrete than that, and I think if the court were to use that as a basis for issuing habeas relief, I think then it would force – you would have to vacate every judgment he ever entered while he sat as a judge, without anything more concrete, anything linking Judge Maloney to improper rulings or corruption or bribery in this case, none of which they have been able to even allege really, let alone demonstrate, there simply is no

justification for entertaining Judge Maloney's status as a criminal suspect.

As to Mr. Carlson's presentation, the Maloney and Nellum issues, it is true, exhaustion is one issue, and because of statutes that have run or whatever, it is now no longer feasible, it is not currently possible for this petitioner to seek post-conviction relief in the circuit courts. The fact remains, though, that these could have been raised at the time and the claims were available in the state court at the time, so then we turn to the question of procedural default. They could have been raised but weren't. [95] The fact that the remedy is no longer currently available is really irrelevant to that equation and for those reasons I think that the procedural default still quite clearly bars the court from reaching the merits.

If I could just briefly return to the Judge Maloney issue again, as an example of that, our Rule 5 submissions 2(d) of the state court materials that were filed with the court, there is a copy of that motion to stay the proceedings and, true, at the time the motion was made he was only under indictment and there had not been a conviction, but that does show that there was an awareness of that proceeding, and as I noticed before, the Supreme Court's opinion on post-conviction did not come down until 1992, at which time Judge Maloney's conviction was long over and I presume his appeal was as well. There was really nothing to stop the Maloney information from being brought out during the post-conviction as well.

As to the charge that the trial court refused a continuance for the death penalty hearing: Now, the claim is raised solely in the context of ineffective assistance of

counsel claim. By the denial of this motion, in other words, counsel was rendered ineffective and he could not bring in the witnesses that he could have used.

We have to remember though that he did not raise this claim in this context under the appeal. If you

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. ROGER COLLINS #A-02120, Petitioner, v. **GEORGE WELBORN**, Warden, Menard Correctional Center, Respondent.	No: 93 C 5282 The Honorable William T. Hart Judge Presiding

PETITIONER'S SUPPLEMENTAL MOTION FOR DISCOVERY

NOW COMES Petitioner, ROGER COLLINS, by and through his attorneys, STEPHEN E. EBERHARDT and ROBERT H. FARLEY, Jr., pursuant to Rule 6, Rules Governing Section 2254 Cases in the United States District Court, and Rule 26, Federal Rules of Civil Procedure, and moves this Honorable Court for an order granting Petitioner leave to conduct discovery. In support of this motion, Petitioner states as follows:

1. On March 24, 1994, Petitioner filed a SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS wherein Petitioner claimed that certain improprieties on the part of former Judge Thomas Maloney deprived Petitioner of a fair trial.

2. On June 2, 1994, the United States Government filed a PROFFER OF THE GOVERNMENT'S EVIDENCE

IN AGGRAVATION AND MEMORANDUM SUPPORTING CONSIDERATION OF PROFFERED EVIDENCE in the case of *United States v. Maloney*, 91 CR 477-1 certain parts of which are attached hereto.

3. The Government's proffer makes clear that " . . . Thomas Maloney's life of corruption was considerably more expansive than proved at trial."

4. A Government witness in the Maloney case has advised counsel for Petitioner that co-defendant Bracy's trial attorney was a former partner of Thomas Maloney.

5. For all the reasons previously argued and briefed before this Court, Petitioner's claims need to be fairly and adequately investigated before disposition of his Writ of Habeas Corpus.

WHEREFORE, Petitioner seeks an order of this Court opening discovery.

Respectfully submitted,
ROGER COLLINS

By: /s/ Stephen E. Eberhardt
One of his Attorneys

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Naperville, Illinois 60540
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 91 CR 477-1
v.	)	Judge Harry D.
	)	Leinenweber
THOMAS J. MALONEY and ROBERT McGEE	)	
	)	

PROFFER OF THE GOVERNMENT'S EVIDENCE IN AGGRAVATION AND MEMORANDUM SUPPORTING CONSIDERATION OF PROFFERED EVIDENCE

(Filed Jun. 2, 1994)

The UNITED STATES OF AMERICA, by JAMES B. BURNS, United States Attorney for the Northern District of Illinois, hereby presents its evidence in aggravation at sentencing and its memorandum supporting consideration of that evidence.

To place this case in context, in most of the judicial corruption prosecutions seen previously in this district, Cook County Circuit Court judges have been convicted and sentenced for taking bribes in relation to their service in the preliminary hearing, misdemeanor, or traffic courts. In fact, the *Maloney* case is the first instance in which a jury has convicted a Cook County Circuit Court judge of bribery-related criminal activity in the felony trial courts. But that dubious distinction does not begin to describe the level of criminal conduct here. Never before this case has a judge in this district (or possibly in this country) been charged with or convicted of fixing even

one murder case. Judge Thomas Maloney now stands convicted of fixing ***three*** such cases.[1]

The range of possible punishment arising out of the Sentencing Guidelines calculations in this case is based *solely* upon the evidence presented at trial: the jury's conclusion that Judge Thomas Maloney took bribes to fix the *Chow, Jones,* and *Hawkins* murder cases and that Robert McGee served as his bagman with respect to the latter two payoffs.[2] The government urges this court to rely upon the new, additional evidence in aggravation outlined in this sentencing submission to sentence defendant Thomas Maloney to the upper end of the applicable guideline range, that is, 293 months in the custody of the Bureau of Prisons.[3]

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[1] The jury in fact also heard evidence that Maloney fixed a fourth murder case, *People v. Rosario*. Because the indictment did not specifically charge this case fix, the jury was not asked to decide whether Judge Maloney committed bribery on this case in the special verdict form it completed at trial.

[2] Of course, the jury also convicted Maloney of fixing the *Roby* case and of obstructing justice. Because the bribery Guidelines operate in large part to peg the guideline range by referencing the severity of the offenses underlying the bribery, the murder cases which Maloney fixed play a greater role in the calculation of the applicable guideline range than does the *Roby* case, which charged deceptive practices.

[3] That the government does not here move for an upward departure is entirely a function of the fact that the sentencing guideline range arising out of the evidence produced to date in this case is rather severe, even in the absence of the proof in aggravation. That notwithstanding, the seriousness of the proof in aggravation certainly merits a quantum of additional punishment, most fairly handled by meting out a sentence at the upper end of the guideline range.

The first section of this submission delineates the evidence the government intends to offer in aggravation at the time of sentencing in this case. Next, the government offers a thorough statement of the existing case law supporting this court's consideration and reliance upon that proof in fashioning a sentence for the defendants in this case.

I. Evidence in Aggravation

A. Summary of Evidence in Aggravation

In essence, the additional evidence that the government seeks to introduce at sentencing will establish that, although difficult to imagine, Thomas Maloney's life of corruption was considerably more expansive than proved at trial.

Specifically, the government's sentencing evidence will show that Maloney's criminal history began with bribe payments he made to Cook County court personnel and judges on a systematic basis during his years as a criminal defense attorney; that in that capacity, Maloney made the initial contact to Pat Marcy to fix the result in the state murder case against La Cosa Nostra hitman Harry Aleman which led to the bribery of Judge Frank Wilson and the acquittal of Aleman in a 1976 bench trial before Wilson; that Maloney was closely tied to the La Cosa Nostra prior to his appointment to the bench and that major organized crime figures looked forward to Maloney's appointment as an opportunity to have a "good friend" on the bench; that after his elevation to the bench, Maloney continued his close First Ward/organized crime connections, fixing the results of a several

murder cases of import to organized crime, including *People v. Lenny Chow* and *People v. Anthony Spilotro* in which Maloney completely acquitted the defendants; and that Maloney engaged in substantial additional bribery using Robert McGee as his bagman.

On this last point, the government also seeks to present proof that in the capital murder case of *People v. Dino Titone*, initial discussions regarding a fix arrangement (to be handled through Robert McGee) fell through and Maloney convicted the defendant in a bench trial and sentenced him to death. Finally, as to Robert McGee, the government seeks to present additional proof that McGee fixed another criminal case, named *People v. Samuel Gracia*, before former Cook County Circuit Court Judge Wayne Olson.

B. Maloney Paid Bribes to Fix Cases as an Attorney

Prior to 1977, defendant Thomas J. Maloney was a criminal defense attorney practicing law in Chicago, Illinois. Between approximately 1975 and June 1976, defendant Robert McGee worked as an attorney in Maloney's firm. In June 1976, Maloney was appointed as a judge in the Criminal Division of the Circuit Court of Cook County. McGee continued his criminal defense practice after Maloney's appointment to the bench.

The government seeks to introduce proof that prior to becoming a judge in 1976, defendant Thomas Maloney paid cash bribes to Cook County Circuit Court personnel. Maloney paid or caused to be paid cash bribes to several Cook County Circuit Court judges to fix the results of

cases he handled before them. On this score, the government seeks to introduce four categories of proof, that is, that defendant Thomas Maloney: (1) paid cash bribes to Judge Maurice Pompey by using Cook County Deputy Sheriff Lucius Robinson as an intermediary; (2) paid cash bribes to Robinson to influence the performance of Robinson's official duties; (3) paid cash bribes to fix cases involving one of Maloney's clients, Michael Bertucci; and, (4) approached Pat Marcy to help orchestrate the fix in the murder case, *People of the State of Illinois v. Harry Aleman*.

1. Defendant Maloney's Bribe Payments to Lucius Robinson and Judge Maurice Pompey

In the 1970s, while a practicing criminal defense attorney, Maloney paid numerous cash bribes to Lucius Robinson. Some of these bribes were paid to Robinson for the purpose of influencing Robinson's activities within the court system. Other bribes were paid by Maloney to Robinson for the purpose of passing them on to Cook County Circuit Court Judge Maurice Pompey.

Maloney had numerous cases before Judge Pompey at that time. On several occasions Maloney gave Robinson newspapers or file folders containing a cash-like bulk in the center to pass on to Judge Pompey. On other occasions Maloney gave Robinson envelopes which contained a cash-like bulk to give to Judge Pompey. Robinson could tell the newspapers, file folders and envelopes contained quantities of cash, but could not tell how much. On occasion, Robinson looked inside the containers and saw that the bulk was indeed cash. Robinson in turn gave

the newspapers, file folders and envelopes to Judge Pompey by either giving them to the judge directly or by leaving them in Judge Pompey's office and then telling the judge about them.

Approximately one time per month Maloney also gave Robinson cash ranging from $5.00 to $30.00. Maloney gave this money to Robinson in exchange for tasks such as getting court continuances and having Maloney's cases placed on a later call.

2. Cases Involving Michael Bertucci as a Client of Attorney Thomas Maloney

Between 1968 and the mid-1980s, the State of Illinois prosecuted Michael Bertucci for numerous offenses. Defendant Thomas Maloney represented Bertucci in many of these matters. Maloney repeatedly told Bertucci that he would pay the judges assigned to Bertucci's cases in order to fix the particular case's outcome. Bertucci paid to Maloney extra money in cash to this end. The specific cases involving Bertucci are described below.

Bertucci first met Maloney in approximately 1968 through Johnny Cox, the son-in-law of organized crime lieutenant Shorty LaMantia.[4] In 1968, Bertucci and Cox were arrested on a narcotics charge and Shorty LaMantia arranged for Maloney to represent them. LaMantia, who paid Maloney's fee in the case, told Bertucci that Maloney was a "fix" lawyer and that Maloney would arrange to

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[4] Shorty LaMantia was a lieutenant in the street crew Angelo LaPietra ran on Chicago's near south side.

have the case thrown out. Indeed, the court later dismissed the case.

In approximately 1970, the police arrested Bertucci and one Johnny Mollo on a possession of stolen goods charge. Maloney represented both Bertucci and Mollo in the case. On one occasion, during a meeting in Maloney's office, Maloney told Bertucci and Mollo that the case against them was a heavy one and that they would have to pay him more money. Bertucci suggested they get another lawyer on the case. Maloney became angry and stated, "Don't worry, I'll fix the cases, if you come up with the money. And don't ever talk to me again about other lawyers in my office." Each time Bertucci met with Maloney on the case they paid him between $500 and $1,500 in cash. The judge eventually threw out the stolen goods charge.

In 1973, Bertucci was charged with the unlawful sale of firearms. The case was assigned to Judge John Murphy.[5] Maloney represented Bertucci in the case and told him not to worry because "the fix is in." Later, when Bertucci appeared in court one day in connection with the case, Maloney told Bertucci that when the judge called a recess to stay in the courtroom and to wait for everyone else to leave. When the judge called a recess, Bertucci waited as the courtroom emptied. The judge suddenly returned to the empty courtroom and called Bertucci's case and the names of the police officers involved. The police officers, who had left the courtroom when the

[5] Judge Murphy was later convicted as a part of the Greylord prosecutions.

recess was called, did not respond and Murphy dismissed the case.

In the first half of the 1970s, Maloney represented Bertucci on a case before Judge Maurice Pompey in the courthouse at 61st and Racine Avenues. During a court recess in the case, Bertucci went to the men's room and was standing near a window when Maloney and then Judge Pompey entered the men's room. Everyone else in the room left. Maloney walked over to Judge Pompey and handed him an amount of cash. When Bertucci returned to the courtroom after the recess, Judge Pompey dismissed his case.

In approximately 1977, Bertucci was charged in Will county with armed robbery. An attorney named Charles Bellows represented Bertucci. Maloney represented Bertucci's co-defendant. Bellows is now deceased. During the pendency of the case, Bertucci heard Maloney tell Bellows that he (Maloney) was to become a judge but that he did not want to because he was making more money as a lawyer.[6]

[6] In fact, conclusive proof exists that defendant Maloney was well aware that his assignment to the bench was going to cause a significant reduction in his annual income. In a Chicago Bar Association questionnaire Maloney completed just prior to assuming the bench, Maloney stated that his judicial salary would be "substantially less" than his private practice income. (Exhibit 1).

3. People of the State of Illinois v. Harry Aleman

In December 1976, the State of Illinois charged Harry Aleman, one of the top La Cosa Nostra hitmen in Chicago, with murder in relation to the shotgun shooting of a man named Billy Logan in the Chicago area. The state's case was a strong one, for two entirely independent witnesses identified Aleman as the killer. One was a mafia underling named Louie Almeida, who drove Aleman to the location of the killing. More importantly, however, the second was an entirely innocent citizen who just happened to be out walking his dog and saw Aleman shoot the victim. Despite the strength of the state's case (or possibly because of it), Aleman's criminal defense lawyer, Thomas Maloney, set the wheels in motion to pay-off the judge to get an acquittal on the case.

In the Aleman *case*, Judge James Bailey was the first judge assigned to the case. Judge Bailey was widely respected as a no nonsense law and order judge. One of the first things attorney Tom Maloney did in handling the defense of Harry Aleman's case was to file a Motion for Substitution of Judges (SOJ), listing Bailey and another. pro-prosecution judge, Judge Frank Wilson, as the two judges whom Maloney and Aleman wanted to avoid. The SOJ Motion stated in pertinent part that Harry Aleman "will not receive a fair trial if he is tried before [Judge Wilson] because said judge is prejudiced against him." *People v. Aleman*, SOJ Motion (attached as Exhibit 2). The case was then reassigned to Judge Fred Suria, widely acknowledged as an honest judge.

Maloney was not going to take any chances with the case of his infamous client. Aleman had been indicted in mid-December 1976 and shortly after the turn of the year, Maloney contacted Pat Marcy to ask for his assistance in fixing the *Aleman* case.[7] Thereafter, Pat Marcy met with Robert Cooley at Counselor's Row Restaurant to arrange the *Aleman* fix. Marcy asked Cooley whether he knew of a judge at the 26th & California courthouse who could handle – *i.e.*, fix – a very serious murder case involving Harry Aleman.[8] Cooley told Marcy that after he got a chance to look at the case file/police reports, he would check.

Upon reviewing the *Aleman* case materials, Cooley thought of several judges who he might contact on the case, the first being Frank Wilson. Cooley had become friendly with Judge Wilson drinking and gambling. Cooley believed that Wilson's reputation as a state-minded judge would benefit a fix by diverting attention, the public thinking that *this* judge would never fix a case. Cooley talked with Judge Wilson several times about the Aleman case. When Cooley first discussed the fix with Judge Wilson, the judge pointed out that he had been "SOJ'd" on the case, referring to the SOJ motion Tom Maloney had filed. Judge Wilson strongly questioned whether Cooley could get the case assigned to him over

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[7] Very significantly, the government anticipates calling *multiple* witnesses to testify that Tom Maloney contacted Pat Marcy to arrange to pay cash for an acquittal in the *Aleman* case.

[8] Although Cooley did not then know Harry Aleman personally, Cooley knew him by reputation and had seen him meet privately on several occasions with Pat Marcy at Counselor's Row Restaurant.

the SOJ. Cooley assured Judge Wilson that he could and asked whether Wilson would fix the case if Cooley could arrange for the assignment.

Judge Wilson eventually agreed to fix the case for $10,000. Judge Wilson told Cooley, however, that he would not agree to the fix unless Tom Maloney agreed to get off of the case. Wilson was concerned that it would look suspicious if the same lawyer who had named Wilson as a judge who couldn't give his notorious client a fair trial suddenly withdraws that statement, the case is then mysteriously shifted to Judge Wilson, whereupon the defendant waives a jury and obtains a not guilty in a bench trial before Judge Wilson. Judge Wilson also said that he wanted Maloney to be the one to withdraw the SOJ motion in open court. Once Wilson agreed to handle the fix, Cooley immediately paid him $2,500.

Cooley quickly met with Pat Marcy and told him that Wilson had agreed to fix the case. Cooley said that Judge Wilson questioned whether they could really get the case assigned to him over the SOJ order barring Judge Wilson from the case. Marcy assured Cooley he could do this. Cooley also told Marcy that Judge Wilson did not want Tom Maloney to represent Aleman because it would look too suspicious.

At about this time, Cooley also met with Harry Aleman at the King's Inn Restaurant on Mannheim Road. Aleman asked Cooley if he was sure he could get a not guilty result in the case. After Cooley said he was, Aleman responded that Cooley better be right. Aleman told Cooley that Maloney wanted to stay on the case and that Maloney was upset because, after going to Marcy to fix

the case, Maloney now was going to be dropped from the case himself. Aleman also told Cooley that Maloney was "with us," – i.e., organized crime – that he can be trusted, that Maloney was going to be appointed as a judge and that the case was to be one of his last cases before he became a judge. Aleman further stated that once Maloney became a judge he would be a good friend to have on the bench.

Cooley then met again with Pat Marcy and related Aleman's comments about keeping Maloney on the case. Marcy too asked Cooley to press Judge Wilson to allow Tom Maloney to remain on the case. Cooley maintained that Judge Wilson opposed this. Ultimately, Pat Marcy found another lawyer to take over the case, a semi-retired attorney named Frank Whalen.

But first the case had to be shifted to Judge Wilson, a highly suspicious course of events which itself lends credibility to the government witnesses' testimony regarding Maloney's participation in the *Aleman* fix. On February 23, 1977, Tom Maloney filed a Motion for Substitution of Judges for Cause, curiously citing remarks Judge Suria made at the time of the bail hearing in the case some 6 weeks earlier. On March 8, 1977, Judge Suria ruled on the motion. As Judge Suria's comments at the time make clear, Judge Suria himself found the motion to be baseless, for he denied the motion as untimely and commented on the odd circumstances attending the motion:

Judge Suria: There is a motion pending, motion for substitution of judges. I had set it today for argument and/or hearing or presentation of any evidence. I would bar both sides

> from offering any evidence in that regard. I would note that the motion is for substitution of judges for cause is [sic] untimely in that the major, ah, facts giving rise to prejudice occurred on the date that I set bail and on this cause was January 7, 1977. Over six weeks later then there was a motion for substitution of judges for cause which in effect arose out of, ah, what the, ah, defense feels my conduct was and my comments were at that time. So I would respectfully deny the defendant's motion. . . .

People v. Aleman, Tr. 3/8/77, at 2-3.

Notwithstanding this ruling, because the defendant had opined in the SOJ motion that he felt he could not get a fair trial before Judge Suria, Judge Suria decided on his own to step off the case. Judge Suria noted that he'd so notified the Chief Judge, who advised Judge Suria of the name of the judge was would be taking Suria's place on the case . . . Judge Frank Wilson:

> Judge Suria: If the defendant feels he can't get a fair trial here, I will recuse myself, gentlemen. I have already so notified the Chief Judge. He has advised me that the matter will be transferred to Judge Frank Wilson in the building.

People v. Aleman, Tr. 3/8/77, at 3.

That same day, the state court half sheet in the *Aleman* case reflects the matter being reassigned from Judge

Suria to Judge Frank Wilson. (Exhibit 3).[9] It was not until March 22, 1977 – 2 weeks *after* the assignment to Wilson – that Tom Maloney first filed a motion on behalf of Harry Aleman to remove the name of Judge Frank Wilson from his original SOJ motion.[10] Maloney filed this motion before Judge Wilson, who granted it. That same day, Tom Maloney also complied with the second of Judge Wilson's fix provisos and filed his motion to withdraw from the *Aleman* case.

From May 16 to May 24, 1977, Judge Frank Wilson presided over the bench trial in *People v. Harry Aleman*. At the conclusion of the proof, Judge Wilson found Aleman not guilty of murder. After the case, Pat Marcy gave Robert Cooley an envelope containing $7,500, which Cooley delivered to Frank Wilson in payment for the not guilty.[11]

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[9] Two very significant points evident from records of the court reveal this action to be highly suspect: 1, as of this time, the court's order (on defendant's SOJ motion) barring Frank Wilson from sitting on the *Aleman* case as was still in effect; and 2, the case went to Frank Wilson even though there were 12 other judges at 26th & California who also heard felony trials in May 1977.

[10] The only proof of such a motion appears on the Circuit Court half sheet for the Aleman case. (Exhibit 3). The Cook County Circuit Court file on the *Aleman* case does not contain any written motion from Maloney seeking to have the name of Judge Wilson removed from his original SOJ motion. There also exists no record of what Maloney might have said by way of an oral motion in this regard, for the court reporter has certified that her request for a search for her stenographic notes of that proceeding led to the answer that no such notes exist.

[11] During the government's investigation using Cooley as an undercover operative, Cooley visited Judge Wilson in

Just as Harry Aleman had predicted, Tom Maloney was appointed to the bench on June 15, 1977, very shortly following the conclusion of the *Aleman* case.

C. Additional Cases Maloney Fixed as a Judge: People of the State of Illinois v. Anthony Spilotro

Just as Harry Aleman had opined, upon being named to the bench, Tom Maloney did prove to be a "good friend" to organized crime. The jury in this case has already convicted Maloney of bribery in the case fix for Chinese organized crime interests in *People v. Lenny Chow*. And, in 1983, Maloney did the same for Aleman's brethren, the La Cosa Nostra, in the case of *People v. Anthony Spilotro*.

In 1983, the State of Illinois obtained an indictment charging La Cosa Nostra boss Anthony Spilotro with the murders of James Miraglia and William McCarthy.[12] The case was assigned to Judge Thomas Maloney. One of

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Arizona to try to engage him in discussion regarding the *Aleman* fix. Wilson, by then retired, did not deny fixing the case though he denied accepting money. Shortly thereafter, Wilson made inquiries as to whether Robert Cooley was cooperating with federal authorities. When Cooley's undercover activities ended the following year, federal agents visited Wilson, informed him that Cooley had been cooperating with them for some time, and then confronted Wilson with the information Cooley had provided about the fix in the *Aleman* murder case, urging Wilson to cooperate with the federal investigation into his activities. Wilson told the agents he would think about it. Tragically, within the month, Wilson committed suicide.

[12] Anthony Spilotro was himself the victim of a mob hit some 3 years later, in 1986.

Spilotro's attorneys in the case was Herbert Barsy. Of course, Barsy was no stranger to case fixes in Maloney's courtroom. About two years earlier as part of the fix arrangement in Chow. Maloney had insisted that Barsy be brought in to handle the Chow court proceedings instead of Robert Cooley. Significantly, a review of computer printouts listing all of Barsy's felony cases before Judge Thomas Maloney reveals that **Barsy obtained not guilty results in all six of the cases he had before Judge Maloney.**

In 1983, during the pendency of Spilotro's case, Robert Cooley saw Barsy and Spilotro in the Counselor's Row Restaurant. Cooley then observed Barsy leave the restaurant and Spilotro go into the back of the restaurant with Pat Marcy. Spilotro and Marcy were gone for approximately five-to-ten minutes. When they returned, Cooley observed that Spilotro appeared to be upset. Spilotro then began a conversation with other persons in the restaurant besides Marcy. Later, Cooley opined to Marcy that Spilotro appeared nervous. Marcy told Cooley that Spilotro had a case up with the same guy with whom Cooley had had a problem and added that Spilotro had nothing to worry about because he (Marcy) "had taken care of it." Cooley understood Marcy's reference to "the guy" with whom Cooley had had a problem to reference defendant Thomas Maloney and Cooley's experiences with Maloney in the *Aleman* and *Chow* cases. Shortly thereafter, Cooley learned that Spilotro had a murder case up before Maloney.

On October 24, 1983, Spilotro waived his right to a jury trial and the bench trial before Maloney began. Three

days later, on October 27, 1983, Maloney found Spilotro not guilty of the murder charges against him.

D. Other Judicial Conduct in Aggravation: **People of the State of Illinois v. Dino Titone**

In *People v. Dino Titone*, Dino Titone was charged with murder and the state was seeking the death penalty. A lawyer named Bruce Roth served as defense counsel for Titone. Roth, himself since convicted of RICO bribery and sentenced to 10 years' imprisonment, informed Titone and his family that he could fix the result of the *Titone* case with Thomas Maloney through the payment of a bribe to **ROBERT McGEE**. The fix ultimately did not go through and Maloney convicted Dino Titone of murder in a bench trial and sentenced him to death. Very significantly, it was in 1990 that Titone's father first informed the government that Roth had named McGee as Maloney's bagman in the aborted fix in the *Titone* case, some two years ***before*** William Swano first came forward and identified McGee as Maloney's bagman.

E. McGee Paid Bribes to Fix Cases

The government seeks to introduce proof that defendant Robert McGee: (1) fixed the result in a series of cases involving clients Michael Bertucci and William Hall; and (2) impermissibly engaged in an *ex parte* discussion regarding the outcome of *People of the State of Illinois v. Gracia*, with the judge then assigned to the case, Wayne Olson, before the case was resolved.

1. Cases Involving Michael Bertucci and William Hall as Clients of Defendant Robert McGee

Defendant Robert McGee became Bertucci's lawyer after Maloney became a judge. McGee paid money to Judge Maloney and to Chicago Police Department officers in order to dispose of Bertucci-based investigations or cases. McGee also represented other clients Bertucci referred to him in cases pending before Maloney. Maloney and McGee fixed these cases as well.

Some time in 1983 or 1984, after Maloney became a judge, Bertucci was involved in burglarizing a television repair store in order to steal guns. Bertucci learned that a Chicago policeman was going to arrest him. Bertucci was using McGee as his lawyer at that time because McGee was Maloney's former law associate. Bertucci paid McGee approximately $1,000 to pay off the police officer in order to prevent the arrest. Bertucci was never arrested in connection with the crime.

In approximately 1984, the State of Illinois charged Bertucci and another man, William Hall, with several separate acts of battery. At the time, Bertucci and Hall were co-owners of a tavern called "Someplace Else." Bertucci hired McGee to represent each of them in their respective battery cases and told Hall that McGee would fix Hall's case. On McGee's advice, Bertucci ultimately plead guilty on his battery charges and received a probationary term.

Hall's first battery case was assigned to Maloney. McGee remarked to Hall at that time that Maloney was a good judge, that McGee fixed cases with Maloney and

that Hall's troubles were over. Bertucci also told Hall about his own cases that had been fixed by McGee and Maloney.

Hall paid McGee approximately $13,500 in cash for his two pending battery cases. McGee initially advised Hall to plead not guilty in connection with the first case and to take a bench trial before Maloney. Hall did as he was told. During the first case's trial, Maloney called a recess after the prosecution completed its case. Hall saw McGee go through the bailiff's office toward Maloney's chambers. Later during the recess, McGee met Hall in the hallway outside Maloney's courtroom and told Hall that he needed an additional $1,500 that day. Hall told McGee that he had already paid $13,500 and that he had no more money. McGee responded, "you're in big trouble."

When Hall returned to the courtroom, McGee told him that Maloney had consolidated the two battery cases and that he (McGee) had had to agree to a plea bargain. McGee told Hall that he would go to prison unless he changed his plea to guilty. McGee also explained that the deal with Maloney was that in exchange for a guilty plea Maloney would sentence Hall to two years' felony probation. Hall agreed to the arrangement and plead guilty. Maloney then sentenced him to a probationary term.

2. People of the State of Illinois v. Samuel Gracia, No. 80 1-907457

In October 1980, Samuel Gracia was charged with possession of a controlled substance. Defendant Robert McGee entered his appearance shortly after Gracia's arrest. The case was assigned to then-Judge Wayne

Olson.[13] On January 14, 1981, Judge Olson heard a motion to suppress Robert McGee filed on behalf of defendant Gracia.

On that same day, before Olson heard Gracia's motion to suppress, McGee conversed twice with Judge Olson in chambers. Federal agents recorded both of these conversations via a Title III listening device placed in Olson's chambers. In the first conversation, at 11:10 a.m., McGee explained to Judge Olson that his client was charged in a "drop case" and that he (McGee) had four or five witnesses on his side. Judge Olson suggested to McGee that he present a motion to suppress and told McGee to be prepared to put on a corroborating witness. McGee and Judge Olson discussed the state of the law and what was needed to sustain a motion to suppress.

McGee and Judge Olson went on to talk about being careful to talk in safe locations and checking their phone lines for wiretaps. McGee told Judge Olson, "I got, I wanna, I wanna get my lines swept one of these days. But I'm always afraid of the guy that sweeps the lines." Judge Olson then suggested that McGee buy his own line sweeper. On the subject of federal wiretap interceptions, the two corrected noted that [federal government officials per Title III] "gotta notify you" if one is intercepted on a federal wiretap. McGee noted, "I gotta get a straight line through. Maloney has that. One phone, just a straight line in."

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[13] Judge Olson was later convicted as a part of the Greylord investigation into corruption in the Circuit Court of Cook County.

Later that day, at 12:53 p.m., McGee and Judge Olson spoke again about the *Gracia* case. McGee pointed out Gracia in the courtroom and Judge Olson stated, "He seems like a gentleman. He seems like a nice kid." At the end of the conversation, when the motion call was about to begin, Judge Olson told McGee, "make me very proud by the way." During the court proceeding which followed the *Gracia* case was called, McGee put on his motion to suppress and Judge Olson granted the motion and SOL'd the case.

William BRACY, Petitioner-Appellant,

v.

Richard B. GRAMLEY,
Respondent-Appellee.

Roger COLLINS, Petitioner-Appellant,

v.

George C. WELBORN,
Respondent-Appellee.

Nos. 94-3801, 94-3807.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 29, 1995.

Decided April 12, 1996.

Rehearing and Suggestion
for Rehearing En Banc
Denied June 26, 1996.

Before POSNER, Chief Judge, and CUMMINGS and ROVNER, Circuit Judges.

POSNER, Chief Judge.

William Bracy and Roger Collins were convicted in an Illinois state court in 1981 of three murders committed the previous year. They were sentenced to death and after exhausting their state remedies (see *People v. Collins*, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267 (1985); 153 Ill.2d 130, 180 Ill.Dec. 60, 606 N.E.2d 1137 (1992)) sought habeas corpus in federal district court. Judge Hart denied them relief, *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950 (N.D.Ill.1994), and they have appealed, arguing that the state denied them due process of law both at their trial and in the sentencing hearing.

The victims had been taken, bound, from an apartment in a building on the south side of Chicago and had been driven to a viaduct and there shot to death with pistols and a shotgun. The main prosecution witness was Morris Nellum, an accomplice who testified for the government in exchange for being charged only with concealing a felony and promised that the state would recommend a sentence of only three years. (In fact he received only two and a half years – and of probation, not prison.) Nellum testified that Collins had summoned him to the apartment, where he had watched as the victims were led out of the apartment and into a waiting automobile by Bracy, Collins, and a third man, Hooper. (Hooper was tried separately, convicted, and sentenced to death. See *People v. Hooper*, 133 Ill.2d 469, 142 Ill.Dec. 93, 552 N.E.2d 684 (1989), affirming the conviction but vacating the death sentence. On remand, Hooper was again sentenced to death, and this time the Supreme Court of Illinois affirmed. 1996 WL 30547 (Ill. Jan. 25, 1996).)

Collins told Nellum to drive Collins's car, which was parked near the apartment building, to the viaduct. Collins and Hooper then got into the car that contained the three victims and drove away, followed by Bracy in another car. Nellum waited a few minutes and then drove to the viaduct as well. As he approached it, he heard shots. He stopped the car. Collins jumped in and they sped off. Later the two drove to Lake Michigan and Collins threw two pistols into the lake. Nellum, after he was arrested, told the police where the guns had been dumped, and the police found them there. Bullets found in the bodies of the dead men were of the type fired by these guns, although the guns had so deteriorated as a

result of their prolonged immersion in the lake that no positive ballistics identification was possible.

Nellum's testimony was corroborated not only by the finding of the guns but also by testimony from a resident of the apartment building who saw the group leaving on the fatal night. She identified Collins, Nellum, and Hooper in court as resembling three of the men she had seen. She testified that one of the three had been wearing a wide-brimmed hat – and Nellum testified that Collins had indeed been wearing such a hat that night. Further corroboration of Nellum's testimony came from another resident, who testified to having seen Bracy and Collins in the building that night, and from a witness who testified that Bracy had borrowed a pistol from her before the murders and that afterward, when they were in a bar and she asked for the pistol back, he had told her that he had murdered some people with it. One of the pistols found in the lake on the basis of Nellum's tip turned out to be the pistol that she had lent Bracy. This witness also testified that in the same bar she had seen a woman give Bracy a sawed-off shotgun that Bracy had then handed to an employee of the bar, apparently for safekeeping. Bracy and Collins testified on their own behalf, denying any participation in the murders, and presented a parade of alibi witnesses of dubious credibility.

The evidence of guilt presented at the trial was compelling, and while there is a question, as we shall see, about the veracity of some of Nellum's testimony, even if that question were resolved in the defendants' favor we would have no basis for doubting the guilt of either Bracy or Collins. Hooper was tried separately because his confession implicated them and the confession is further

evidence, though of course not evidence presented to the jury in our case, that they really did, along with Hooper, commit the murders. Because this evidence was inadmissible it cannot be used to show that the errors of which Bracy and Collins complain are unlikely to have affected the verdict. Cf. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *United States v. Ross*, 77 F.3d 1525 (7th Cir. 1996). But the evidence that *was* admissible shows that they were guilty and this is important because, with a few exceptions, a person convicted in a state court may not obtain an order for a new trial from a federal court on the basis of constitutional errors committed at the trial unless the errors resulted in actual prejudice, or, equivalently, unless they substantially influenced the verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993), or, in other words, were likely to have made the difference between conviction and acquittal.

The only error that the petitioners argue requires a new trial regardless of whether it was prejudicial is that the judge who presided at their trial was later convicted of having accepted bribes from criminal defendants in several other cases (including murder cases) around the time when Bracy and Collins were tried. *United States v. Maloney*, 71 F.3d 645, 650-52 (7th Cir.1995). There is no suggestion that Bracy and Collins bribed or offered to bribe him. The argument rather is that Judge Maloney came down hard on criminal defendants in cases in which he was *not* bribed, to avoid suspicion that he was on the take, to cancel any bad impression that his acquittals might make on the voters – maybe even to make defendants desperate to bribe him, fearing he would punish

them with adverse rulings if they did not. There is no evidence, but only conjecture, that Maloney actually did lean over backwards in favor of the prosecution in this or any other case in which he was not bribed; did, that is, rule against the defense only because he was taking bribes in other cases. Collins argues that evidence is unnecessary, and Bracy that if it is necessary their request for discovery should have been granted.

A judge could be biased and yet the bias not affect the outcome of the case. But judicial bias is one of those "structural defects in the constitution of the trial mechanism," as distinct from mere "trial errors," that automatically entitle a petitioner for habeas corpus to a new trial. *Brecht v. Abrahamson, supra*, 507 U.S. at 629, 113 S.Ct. at 1717; see *Sullivan v. Louisiana, supra*, 508 U.S. at 278-79, 113 S.Ct. at 2081; *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927); *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir.1995). What is bias? Defined broadly enough, it is a synonym for predisposition, and no one supposes that judges are blank slates. There are prosecution-minded judges, and defense-minded judges, and both sorts have predispositions – biases that place an added burden on one side or the other of the cases that come before them. Yet no one supposes that the existence of such biases justifies reversal in cases where no harmful errors are committed. The category of judicial bias is ordinarily limited to those predispositions, real or strongly presumed, that arise from some connection pecuniary or otherwise between the judge and one or more of the participants in the litigation. Whether the present case even fits that mold may be doubted, but, in any event, for bias to be an automatic ground for the

reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased." *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1380 (7th Cir.1994) (en banc); see *Branion v. Gramly*, 855 F.2d 1256, 1268 (7th Cir.1988); *Margoles v. Johns*, 660 F.2d 291, 296-97 (7th Cir.1981) (per curiam). In rejecting reversal on the basis of a mere appearance of partiality or bias *Del Vecchio* relied in part on a presumption, obviously inapplicable here, that judicial officers perform their duties faithfully. 31 F.3d at 1372-73. But that was not the core of the decision. The fundamental reason that an appearance of impropriety is not alone enough to require a new trial is that it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it. The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway.

Sometimes – this is the second half of the test that we quoted from *Del Vecchio* – the incentive to engage in biased behavior is so great that inquiry into the actuality of that behavior is pretermitted. *Id.* at 1372-73; see also *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). This rule recognizes both the practical impediments to obtaining reliable evidence of a judge's motives and the difficulty of overcoming public skepticism of judicial motives when the temptation to impropriety is great. But the automatic rule must be interpreted circumspectly, with due recognition of the cost to society of

overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness. The fact that the people for obvious practical reasons do not have judicially enforceable rights to the protection of the criminal laws (though they do have judicially enforceable rights against discriminatory withdrawal of that protection) does not warrant a court in disregarding their interests when the court is formulating rules of constitutional law. Accepting Collins's contention would require a new trial in *every* case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor. (If the *defendant* had bribed the judge and been acquitted, the double jeopardy clause probably would not bar reprosecution, *Benard v. State*, 481 S.W.2d 427, 430 (Tex.Crim.App.1972) – the defendant would never have been in any actual "jeopardy." The issue has not been definitively resolved, however, David S. Rudstein, "Double Jeopardy and the Fraudulently-Obtained Acquittal," 60 *Mo. L. Rev.* 607 (1995), and obviously need not be in order to decide the present case.) *Any* judge who is on the take will have an incentive to adopt Judge Maloney's alleged strategy and thus always do his best (or worst) to see to it that a defendant who does not bribe him is convicted. A principled acceptance of Collins's argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes. The fact that this is a death case magnifies the appearance of

impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence.

The assumption underlying Collins's argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that *any* system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime. See generally Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *U.Chi.L.Rev.* 689, 726-29 (1995).

No precedent has been cited to us for invalidating a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in other cases. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), disapproved the use of novel grounds to grant relief on an application for habeas corpus. The state does not cite *Teague*, but we are free to apply it anyway. *Caspari v. Bohlen*, ___ U.S. ___, ___, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994); *Eaglin v. Welborn*, 57 F.3d 496, 499 (7th Cir.1995) (en banc). The argument for automatic reversal is not compelling even if its lack of a secure grounding in prior cases and its alarming potential irradiation of future cases are ignored. While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes – to right the balance as it

were – it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take. When a severely prosecutorial judge sides unexpectedly with the defense in some arbitrary subset of cases, corruption is a possible explanation. If instead the judge maintains a generally pro-defendant stance, he may jeopardize his chances for reelection (Maloney was appointed to a vacancy, but he had to stand for election, and did so, when the term of his original appointment expired), and the number and size of the bribes he receives may be diminished because defendants will be less fearful of the consequences of not bribing him. But he may also still any suspicions that he is on the take, because his rulings in favor of defendants in cases in which he is bribed will not stand out.

This was a jury trial rather than a bench trial, moreover, and acquittals in jury trials are more likely to be blamed on the jury than on the judge. When as sometimes happens a judge campaigning for election is accused of never having convicted a rapist or sentenced a murderer to death, cf. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 226 (7th Cir.1993), the reference is to bench trials, where the decision to convict or acquit is the judge's, and to sentences handed down by judges rather than, as in capital cases in Illinois, by juries unless the defendant waives a jury. It is in cases tried to the bench that the judge as decision-maker must shoulder full responsibility for the decision. When he merely presides, his responsibility for the outcome is less. We do not understand Bracy and Collins to be arguing that Maloney was more likely to sentence them to death, as distinct

from being more likely to rule against them during the trial, as a consequence of his taking bribes in other cases.

We are, it is true, speculating about the likely impact of Maloney's corruption on the rulings that he made at the trial of these petitioners. We also acknowledge the possibility that the cumulative effect of those rulings was greater than we imagine. *Tyson v. Trigg, supra*, 50 F.3d at 439. But the defendants are speculating too. Some of Maloney's rulings went against the defendants and obviously those are the ones they complain about, but they have not shown that there were so few rulings in their favor that the judge *must* have been biased in favor of the government. To show this would not have required an investigation, but merely a review of the transcript of the trial. It is unlikely that the specific rulings of which the defendants complain either were the product of a corrupt backward bending in the government's favor or influenced the jury's verdict. The Supreme Court of Illinois did not find any errors in the rulings.

The argument that a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition to persuade us to treat this case as if Judge Maloney had taken a bribe from the government to convict. If the argument is rejected, ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process. Appearance of impropriety there was. We know this because if a judge were under indictment for accepting bribes he would not be permitted to hear any cases. Ill. S.Ct. R. 56(a)(1). But without more a defendant's conviction cannot be set aside.

The petitioners also seek discovery, so that they can try to find out whether there was actual bias by Judge Maloney at their trial. Discovery is available in a habeas corpus proceeding not as a matter of course as in an ordinary civil litigation but only if the district judge finds "good cause" to order discovery. Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts; *East v. Scott*, 55 F.3d 996, 1001 (5th Cir.1995). The petitioners want to study a large sample of Judge Maloney's cases to see whether a pattern of favoring the prosecution in cases in which he was not bribed emerges, to depose "some of those persons and witnesses who were most intimately associated with Judge Maloney who may be able to provide material information on his behavior in cases where he didn't get bribes," and to get hold of any evidence that the federal government might have obtained in its prosecution of Maloney that he really did lean over backwards in favor of the government in cases in which he was not bribed – perhaps in this very case. The first proposal would not require formal discovery at all, since Maloney's cases are a matter of public record. The third too; in the first instance at any rate, all it would require is a perusal of the transcript of Maloney's trial. It is true that a part of the trial record was sealed, but it was unsealed in August of 1994, so that the petitioners' lawyers have had a year and a half to look for clues in that record. The second proposal is for a fishing expedition. Even if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in this case. This may be a case

in which *any* judge would have ruled in favor of the government in the instances of which the defendants complain.

A party to an ordinary civil suit need not demonstrate good cause in order to be permitted to conduct discovery. A petitioner for habeas corpus must, because collateral attack on a criminal judgment that has become final is an extraordinary remedy. Without the aid of formal discovery the petitioners' able counsel could have (and perhaps have) studied the pattern of Judge Maloney's rulings in cases in which he did and cases in which he did not take bribes, could have (and perhaps have) inventoried his rulings in the present case to see whether they consistently favored the prosecution, and could have (and perhaps have) studied the record of Maloney's prosecution by the United States for clues to their theory of bias. If none of these public sources of information has yielded any evidence of bias in our case – and none has – the probability is slight that a program of depositions aimed at crooks and their accomplices and likely to be derailed in any event by real and feigned lapses of memory will yield such evidence.

We do not make light of judicial corruption. It has tainted the judicial system of Illinois, caused unjust acquittals, jeopardized convictions, tarnished the legal profession, and raised profound doubts not only about the state's method of selecting judges but also about the entire political culture of the state. But in the circumstances of this case, corruption is not a constitutional ground for vacating the petitioners' convictions.

The petitioners raise another issue of bias, this in the context of a claim of ineffective assistance of counsel. One of the jurors was the wife of an Illinois state judge who had once sentenced Bracy to prison for armed robbery. The defendants' lawyer was aware of this but did not object to her being selected for the jury. Toward the end of the trial, however, the lawyer revealed to the jury that Judge Downing, the juror's husband (though not identified as such to the jury), had once given Bracy the most severe sentence that he had ever received prior to this case. The petitioners argue that, thus reminded that her husband had dealt harshly with Bracy on a prior occasion, Mrs. Downing was bound to be prejudiced against Bracy and perhaps therefore his codefendant as well. This is too thin a speculation to justify a new trial on the ground of ineffective assistance of counsel and we are not persuaded by the proposal that in lieu of ordering a new trial we order the district court to conduct an evidentiary hearing at which Mrs. Downing would be questioned about what she was thinking when she was a member of the jury fourteen years ago. The defendants were content to have as a juror the wife of the judge *who they knew had sentenced Bracy to a long prison term*, and the decision to accept her is not and could not plausibly be claimed to be ineffective assistance. Only the lawyer's slip of the tongue that revealed this fact to her could be thought ineffective assistance. But if so, the likely prejudice was too slight to warrant a new trial, or an evidentiary hearing unlikely to be any more fruitful than discovery concerning Judge Maloney.

Another alleged irregularity at trial is the judge's failure to strike remarks made by the prosecutors in

closing argument. The worst remark to which an objection has been preserved was: "and if you think I would jeopardize my license, my family, my children, my future to put [a peripheral witness named Dorfman] on in a case and make him lie. . . . " This is claimed to be "vouching" for the truth of the witness's testimony, which prosecutors are not supposed to do, because it crosses the line from advocacy to testimony. Defense counsel had accused the prosecutor of wanting to convict Collins so badly that he "made a guy [Dorfman] come in here and tell you something that he knows is not in that report." In other words, defense counsel was accusing the prosecutor of having made a witness tell a lie. The prosecutor denied this in the passage that we have quoted. This was not vouching for the truth of the witness's testimony. It was denying that the prosecutor had made the witness lie. And anyway vouching is not a violation of any specific constitutional right but at most an irregularity that if shown in a particular case to have been likely to have led to the conviction of an innocent man might be held to be a denial of due process of law in that case. *Rodriguez v. Peters*, 63 F.3d 546, 558 (7th Cir.1995); *Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir.1995). No such inference is possible here.

The next question is the standard for granting an evidentiary hearing when, long after the conviction of a criminal defendant, a prosecution witness steps forward and recants a part of his testimony. Many years after the trial of Bracy and Collins, a private investigator retained by the defendants' counsel talked to Morris Nellum. Later Nellum was interviewed by Bracy's lawyer and a transcript was made of that interview. Nellum did not

recant his testimony that Bracy and Collins had committed the murders. He merely tried to exonerate the third murderer, Hooper. But in explaining how he had come to testify against Hooper he made lurid accusations that the police had beaten Bracy and him (Nellum) and threatened him with a sledgehammer and that the prosecutors had told him to lie about such details as when he had first told the police where the pistols used in the murders had been pitched. The jury had been told that Nellum had at first denied knowing the whereabouts of the gun but not that the prosecutors had told him to lie about that denial.

Nellum later repeated a part of his recantation in a deposition that was interrupted when an Illinois prosecutor who had talked to him after the interview with defense counsel, and an Arizona prosecutor, reminded Nellum that he had said he only wanted to testify in front of a judge. In seeking an evidentiary hearing the defendants' lawyers rely primarily on the transcript of the interview rather than on the interrupted deposition. They argue that it creates enough suspicion that the prosecutors knowingly used perjured testimony at the trial to require an evidentiary hearing to get to the bottom of Nellum's recantation.

None of the alleged lies concerns a matter vital to the government's case. Nellum did not deny that he was present when the victims were removed from the apartment, that he drove to the viaduct to pick up Collins, and that he saw Collins toss the pistols into Lake Michigan. Yet if the jury had thought that the police had beaten Nellum and that the prosecutors had coerced him to lie, albeit about details of the offense rather than about the involvement of the defendants, his credibility, already

compromised because he was testifying in exchange for the promise of a sentence extraordinarily lenient considering that he had been an accomplice in three murders, might have been so far impaired that the jury would have disbelieved the core as well as the periphery of his testimony.

Given this possibility, we must consider what showing based on newly discovered evidence that a constitutional violation may have been committed at trial (here, the knowing use of perjured evidence by the prosecution) is necessary before a hearing to determine the truthfulness of the evidence is required. The state argues only weakly that the petitioners should have obtained the recantation sooner, in which event it would not be newly discovered evidence in the relevant sense. *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1536 (10th Cir.1994). So the request for an evidentiary hearing is not barred by a want of diligence, and furthermore it cannot be a condition of the grant of such a hearing that the movant already have in his possession all the evidence that he seeks to develop in the hearing. But equally it cannot be enough that the petitioner has found *some* new evidence. To reopen a criminal proceeding many years after the defendant was convicted and his conviction affirmed (which in this case occurred more than ten years ago) is an extraordinary interference with the finality of the criminal process and requires a demonstration that a hearing would probably yield evidence that would require a new trial at which the petitioner would have a substantial chance of acquittal. In view of the passage of time since, and the disordered social milieu in which, the petitioners committed these murders, it is doubtful

whether they could be retried with good prospects for an accurate verdict, even though their guilt of multiple murders committed in cold blood is not in doubt. They cannot be blamed for the fact that it has taken fifteen years for their challenge to their convictions to come to this court; so far as we can tell, they have not abused the postconviction process. But one consequence of the extraordinary delays that are tolerated in capital cases in order to minimize the risk of mistaken execution is that an order for a new trial issued toward the end of the normal postconviction process may have the practical effect of an acquittal. This consideration makes judges hesitate to order new trials on the basis of newly discovered evidence unlikely to be reliable or, even if believed, to undermine confidence in the verdict.

We are mindful that in *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963), the Supreme Court stated that "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing" unless the petitioner received a full and fair hearing in state court. This passage from the *Townsend* opinion continues to be quoted approvingly. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993). But it cannot be taken literally, since we know that the district court "may employ a variety of measures in an effort to avoid the need for an evidentiary hearing" on disputed facts, *Blackledge v. Allison*, 431 U.S. 63, 81, 97 S.Ct. 1621, 1633, 52 L.Ed.2d 136 (1977), including a direction to expand the record to include evidentiary materials that may resolve the factual dispute without a hearing. *Id.* at 82, 97 S.Ct. at 1633; Rule 7 of the Rules

Governing Section 2254 Cases in the United States District Courts.

Likewise, not any old allegation of newly discovered evidence will trigger an evidentiary hearing; the allegation must be "substantial." *Townsend v. Sain, supra*, 372 U.S. at 313, 83 S.Ct. at 757. That is common sense. Had Judge Hart in his order of August 24, 1994, granted rather than denied the motion for an evidentiary hearing, and the hearing been held later that year, the witnesses, primarily Nellum and the prosecutors and police involved in the investigation and prosecution of the murder cases against Bracy, Collins, and Hooper, would have been testifying about events that had occurred thirteen to fourteen years earlier. So long an interval between the events and the testimony about the events would cast a pall of doubt over the reliability of the testimony. Ours is not the typical situation in which an evidentiary hearing is granted in a postconviction proceeding. Not only is the interval typically shorter, as in *Daniels v. United States*, 54 F.3d 290 (7th Cir.1995), and *Barkauskas v. Lane*, 878 F.2d 1031, 1034 (7th Cir.1989), but when it is as long as it would be here this is usually because the state failed to give the petitioner a full and fair hearing, and the state must not be rewarded for its own denials of due process. When the request for a federal evidentiary hearing is based on evidence gathered long after the event – too late to be presented to the state courts, which cannot be faulted for having failed to provide the petitioner with an evidentiary hearing – the federal court is entitled to insist, as a precondition to granting a hearing, that the petitioner demonstrate that he have a "colorable" claim, meaning by this not that it be nonfrivolous on its face (the

usual meaning of "colorable") but that there be some reason to think it valid. *Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir.1994).

Even if Nellum testified under oath to all that he had told Bracy's lawyer and even if his testimony were believed over that of prosecutors and police almost certain to testify contrary to Nellum, thus establishing that the prosecution made knowing use of perjured testimony, a new trial would not be warranted. The knowing use of perjured testimony by the prosecution, although a very serious infringement of the constitutional rights of a criminal defendant, is not an automatic basis for a new trial. There must be a reasonable likelihood that the violation affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir.1995). The evidence of Bracy's and Collins's guilt was very powerful and evidence brought out at the evidentiary hearing which if repeated at a new trial would merely cast doubt on Nellum's credibility would be unlikely to sway a jury. We are imagining a new trial at which all the evidence is the same except that Nellum changes some of the details of his earlier testimony, and, when the changes are thrown in his face, makes lurid accusations against the police and the prosecutors. The core of Nellum's testimony would be unaffected and would be richly corroborated by the testimony of the other witnesses whose evidence we summarized at the beginning of this opinion (assuming those witnesses can be found and persuaded to testify or the transcript of their original testimony is admitted at the second trial),

and by the guns. Of course we cannot be certain that once Nellum started down the recantation path he would go no further than he has done to date. Having completed his bargained for sentence long ago he has no incentive to cooperate with the prosecution. But the more sweeping his recantation, the less credible it is likely to be.

Prosecutors frequently rely heavily on the testimony of members of the criminal class, such as Nellum, who did not "go straight" after completion of his light sentence for his role in the murders. They have no choice. These witnesses from the criminal demi-monde are not only unreliable witnesses, as the defendants' counsel emphasized to the jury in asking them to disbelieve Nellum's testimony; they are unreliable *people*. We would be imperiling the punishment of dangerous criminals if we established a precedent that would invite the lawyers for convicted defendants (especially in capital cases, not only because of the stakes involved but also because few prisoners other than those under sentence of death are represented in postconviction proceedings) to pester these witnesses to recant many years after they had testified. We do not suggest that the lawyers would act unethically. In the American system of justice the zealous representation of a client is a duty, not an ethical lapse. And in some cases the recantations would be genuine and material and if so they would be a proper basis for ordering a new trial despite the passage of time. But we are given no reason to suppose that Nellum's recantations are either genuine or material. His original testimony was amply corroborated and his recantation preserved the

core of the original testimony intact. And while the interview with Bracy's lawyer occurred in 1992 and the abortive deposition the following year, in the more than two years that have elapsed since the deposition the defendants' current lawyers, whose energy and ability cannot be doubted, have failed to obtain any corroboration for Nellum's recantation.

We cannot of course determine the credibility of Nellum's recantation; we can only express our suspicions. These are germane, however, because an evidentiary hearing need not be granted on the basis of newly discovered evidence presented many years after the defendant's conviction became final unless there is a good reason to expect the hearing to result in an order for a new trial. We cannot find this proposition clearly articulated in any case, but it seems to us consistent with the results in the cases and sound as a matter of first principles. The circumstances of Nellum's recantation, the strength of the original evidence, and the fact that the core of his testimony was not recanted persuade us that the request for an evidentiary hearing was properly denied.

We turn to the defendants' challenge to the sentencing hearing. They complain that their lawyers were not given enough time to obtain evidence of mitigating circumstances for submission to the jury at that hearing. They asked for a continuance immediately after the jury convicted their clients but it was denied. It was properly denied. In Illinois the jury that determines the defendant's guilt in a capital case also determines whether he is to be sentenced to death, unless as in this case the defendant waives his right to be sentenced by the jury. Since it is the same jury, the sentencing hearing perforce

follows immediately upon the trial, as it also does when the jury is waived. Defense lawyers know all this and therefore if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends. But in this case the defendants' lawyers dropped the ball and the defendants argue in the alternative that by doing so the lawyers failed to provide competent assistance of counsel at the sentencing hearing.

Perhaps so, but we need not decide this; for there was no prejudice, and without proof of prejudice a claim of ineffective assistance of counsel cannot succeed. The defendants' current lawyers have turned up no mitigating circumstances that might have been put before the jury with a fair chance of success. It is true that one of the *aggravating* circumstances, though limited to Bracy, is that shortly after participating in the triple murder in Chicago he participated in a double murder in Arizona. He had not yet been tried for those murders but the woman who was the wife and daughter of the murder victims and the state's main witness was brought to Chicago to testify in the sentencing hearing that Bracy was indeed one of the Arizona murderers. The defendants argue that their lawyers failed to present alibi evidence that might have persuaded the jury that Bracy had not committed those murders. We have little patience with this argument. Bracy was later convicted and sentenced to death for the Arizona murders, and the burden of proof that the state bore in convicting him was of course higher than it bore in the sentencing hearing, for the existence of an aggravating circumstance need only be proved by a preponderance of the evidence, provided that at least one such

circumstance has been proved beyond a reasonable doubt, thus making the defendant eligible for the death sentence. 720 ILCS 5-9-1 (f); *Free v. Peters*, 12 F.3d 700, 703 (7th Cir.1993); *People v. Ramey*, 152 Ill.2d 41, 178 Ill.Dec. 19, 35-36, 604 N.E.2d 275, 291-92 (1992). So if all the evidence that had been before the Arizona jury had been presented to the jury in Chicago, the Chicago jury surely would have found that Bracy had committed the Arizona murders. Not all that evidence was presented, so maybe the jury would have been swayed by alibi evidence that we now know is false. But no principle of justice authorizes throwing out a sentence on the ground that the sentence might have been different had the defendant been allowed to present false testimony. *Lockhart v. Fretwell*, 506 U.S. 364, 369-71, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175-76, 106 S.Ct. 988, 998-99, 89 L.Ed.2d 123 (1986).

Bracy objects to some remarks by the prosecutor at the closing argument at the sentencing hearing. The worst was, "Some of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment of the Bible." This was a response to defense counsel's argument that to sentence the defendants to death would violate the Ten Commandments, one of which of course is, "Thou shalt not kill." The prosecutor was pointing out, with unnecessary but not we think fatally prejudicial emphasis, that there is such a thing as justified homicide and that the execution of a duly convicted and sentenced murderer is, plausibly, an illustration of it.

Collins objects to the exclusion of a prospective juror on the basis of his acknowledging in response to a question by the judge that he would "probably" not consider imposing the death penalty. The defendants' lawyer did not object to excusing this prospective juror for cause. We do not think this was error, and certainly not error of constitutional proportions, given the absence of an objection. *Wainwright v. Witt*, 469 U.S. 412, 424-26, 429, 105 S.Ct. 844, 852-54, 855, 83 L.Ed.2d 841 (1985).

The petitioners present other issues, but they either have too little merit to warrant discussion or they are foreclosed by previous decisions of this court that we are not given any reason to reexamine. We have considered the possibility that the cumulative effect of the various irregularities alleged tips the balance in favor of a new trial or a new sentencing hearing but have concluded that it does not. We regret that Judge Maloney presided over the petitioners' trial but we do not think that the Constitution relieves them from the judgments that the Illinois courts have rendered.

AFFIRMED.

ILANA DIAMOND ROVNER, Circuit Judge, dissenting.

No right is more fundamental to the notion of a fair trial than the right to an impartial judge. *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423 (1971) (per curiam); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio*, 273 U.S.

510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). "The truth pronounced by Justinian more than a thousand years ago, that '[i]mpartiality is the life of justice,' is just as valid today as it was then." *United States v. Brown*, 539 F.2d 467, 469 (5th Cir.1976) (per curiam). The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

The State of Illinois placed the fate of William Bracy and Roger Collins in the hands of a racketeer. Thomas Maloney is presently serving a prison term of nearly sixteen years for racketeering, conspiracy to commit racketeering, extortion under color of official right, and obstruction of justice. A jury determined that Maloney had accepted $10,000 in 1986 to acquit two El Rukn leaders of a double murder, an undetermined portion of a $100,000 payment in 1981 to acquit three New York gang members of murdering a rival in Chicago's Chinatown, and between $4,000 and $5,000 in 1982 to convict another individual of voluntary manslaughter rather than felony murder. These were but three of the bribes that witnesses attributed to Maloney at his trial. *See United States v. Maloney*, 71 F.3d 645 (7th Cir.1995); Matt O'Connor, *Judge Maloney found guilty in corruption case*, CHICAGO TRIBUNE, April 17, 1993, News, at 1. At sentencing, Judge Leinenweber also found that Maloney had, while still a practicing lawyer, cooperated in procuring the notorious acquittal of reputed mob hitman Harry Aleman by Judge Frank Wilson in 1977. Mob enforcer Michael Bertucci testified that Maloney had helped him to evade a series of

criminal charges by bribing judges as far back as the late 1960s, although Judge Leinenweber discounted this testimony. It would seem, in any event, that by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption, an art that he would practice at least until 1986, when he correctly perceived that he was under the watchful eye of the FBI and returned the $10,000 bribe he had accepted in the El Rukn prosecution.

Bracy and Collins were tried before Maloney in 1981, in the midst of Maloney's bribe taking. Maloney did not solicit a bribe from either defendant, nor did the defendants offer him one. Nor did the prosecution bribe Maloney. But given the abundant proof (and a federal jury's finding) that justice was for sale in Maloney's courtroom, we are compelled to consider whether Maloney may be deemed the impartial judge to which due process entitled these defendants.

1.

The petitioners argue that in cases that were not fixed, Maloney had an incentive to be particularly tough on defendants, in order to divert suspicion that might otherwise be aroused by the acquittals he was paid to render and to strengthen the incentive for defendants to bribe him. Without conceding that further evidence of Maloney's partiality was required to establish Maloney's constitutional inadequacy as a judge, the petitioners sought leave from the district court to engage in discovery, with the aim of establishing a pattern of corruption that affected Maloney's conduct in not only those cases in

which he had accepted a bribe but also those in which he had not. Judge Hart denied their request, deeming what the petitioners sought to prove to be a matter of speculation and, in any event, insufficient to establish a constitutional deprivation. *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 991 (N.D.Ill.1994). Like my colleagues in the majority, the district judge concluded that the most the circumstances permitted Bracy and Collins to argue was the mere possibility of bias, which *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363 (7th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1404, 131 L.Ed.2d 290 (1995), indicates is not enough to establish a deprivation of due process. 868 F.Supp. at 991.

In fact, the notion that Maloney was deliberately tough on defendants who did not bribe him finds support in the testimony presented at Maloney's trial. Defense attorney William Swano arranged several of the bribes for which Maloney was prosecuted and was a key government witness against him. In 1985, Swano represented James Davis, whom the state had charged with armed robbery. The case was assigned to Maloney for trial. By this time, Swano had already bribed Maloney on a number of occasions. But after investigating the prosecution's case against Davis, Swano concluded that it would be unnecessary to bribe Maloney in order to obtain an acquittal in this case: three witnesses to the robbery knew the two perpetrators and said that Davis was not one of them; Davis had an alibi; and the victim of the crime, who had initially identified Davis as one of the perpetrators, had confessed uncertainty about the identification. Swano was confident that "[t]he case was a not guilty in any courtroom in the building." *United States v. Thomas J.*

Maloney and Robert McGee, No. 91 CR 477, 1994 WL 96673 Tr. 2528 (N.D.Ill. March 24, 1993). To Swano's surprise, however, Maloney convicted his client after a bench trial. Swano took this as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Tr. 2530. That Swano had correctly interpreted this conviction as a lesson was arguably confirmed by Maloney's bagman, Robert McGee. Swano met with McGee soon after Davis was convicted to discuss a fix in the double murder trial of the two El Rukns. Swano had persuaded his client that bribing Maloney was the prudent course, explaining that he had only lost one case before Maloney, "and that was the one that we didn't work," *i.e.*, fix. Tr. 2544; *see also* Tr. 2559. In arranging the meeting with McGee, Swano had told him that he wanted to discuss "a hot case in front of Judge Maloney". Tr. 2567. McGee said that he would first have to obtain Maloney's permission. Tr. 2567. When Swano and McGee subsequently met at Le Bourdeux, a local watering hole, McGee told Swano that he had gotten the okay from Maloney to speak about the matter. Swano recalled: "He told me that the judge had said we could talk, especially in view of the way the judge had screwed me on the last case," which Swano understood to be a reference to the Davis case. Tr. 2567-68. Swano voiced agreement with the assessment "that the judge had screwed me on the case and had screwed my client." Tr. 2568. He and McGee then got down to details about the El Rukn fix. That bribe was one of four that the jury later found Maloney guilty of accepting.

One may infer from Swano's testimony that Maloney saw the Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that

would ensure bribes in future cases. That, at least, was the moral of the story for Swano. If Swano was right (a matter for the factfinder, not us, to determine), then it would seem that Maloney's approach to case fixing was indeed the global view that Bracy and Collins posit: fixed cases were a source of illicit profit, whereas unfixed cases were an opportunity, as Bracy puts it, to "advertise" in the defense bar (Bracy Reply at 1) while at the same time protecting his franchise by currying favor with law and order minded voters and avoiding the ire of the law enforcement community. Like my colleagues, I think that the petitioners face an exceedingly difficult task in attempting to unearth evidence that will lend further support to their theory (*see ante* at 691), but Swano's testimony suggests that the search may not be futile.

At bottom, my colleagues believe that Bracy and Collins are not entitled to discovery because the most they can hope to prove is that Maloney made it a practice to lean over backwards in favor of the prosecution in cases in which he was not bribed; without proof that he followed that practice in *this* case, they reason, Bracy and Collins have no claim. *Ante* at 691. But when the trial judge is tainted by a pervasive conflict of interest – in other words, one not limited to a particular litigant or type of case-evidence that the taint had a discernible effect on a given case is unnecessary. Here the showing that my colleagues require would be all but impossible to make, absent either an extraordinary admission from Maloney, which is not forthcoming (Maloney continues to proclaim his innocence) or the kind of over-the-top courtroom behavior that makes a judge's partiality plain (*see, e.g., United States v. Dellinger*, 472 F.2d 340, 386-88 (7th

Cir.1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973)), a rare phenomenon not evident from the record here. In any event, the Supreme Court has expressly rejected the idea that such proof is mandated, finding that it "requires too much and protects too little." *Ward*, 409 U.S. at 61, 93 S.Ct. at 83; *see also Aetna*, 475 U.S. at 830-31, 106 S.Ct. at 1590 (Brennan, J., concurring); *id.* at 831-33, 106 S.Ct. at 1590-91 (Blackmun, J., concurring). To establish a deprivation of due process, the petitioners need only show that the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532, 47 S.Ct. at 444; *accord Aetna*, 475 U.S. at 822, 106 S.Ct. at 1585; *Ward*, 409 U.S. at 60, 93 S.Ct. at 83; *Del Vecchio*, 31 F.3d at 1372, 1373. Proof that Maloney was motivated by virtue of his bribe taking to favor the prosecution and disfavor the defense in unfixed cases would permit, if not compel, the inference that Maloney's adverse rulings against Bracy and Collins were animated by a pernicious intent on Maloney's part (*see* Fed.R.Evid. 404(b)) and would more than satisfy the standard the Supreme Court has enunciated.

Habeas Rule 6(a) requires only that the petitioner demonstrate "good cause" to engage in discovery, and Bracy and Collins have certainly done so here. In view of the jury's verdict against Maloney, it is undisputed that he was accepting bribes at the very time that Bracy and Collins came to trial. Although there is no suggestion that money oiled the wheels of justice in this case, my colleagues concede the plausibility of the notion that "a

judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes." *Ante* at 689. Putting aside for the moment contamination of the judge's philosophy, it seems to me likely that any judge who accepts bribes and wishes to remain on the bench will think in strategic terms about his other cases. As Chief Judge Posner points out, one might wonder whether it would really have been in Maloney's interest to assume a pro-prosecution mantle in unfixed cases, lest the occasional acquittal purchased from him look out of character. *Ante* at 689-90. But the time for such deliberation is after an evidentiary hearing on the matter, when the petitioners have had the opportunity to find and present whatever evidence there may be to establish any practice Maloney may have followed. Swano's testimony provides some evidence in that regard, and there may be more. Without giving Bracy and Collins the opportunity to present that evidence to Judge Hart, their claim of conflict can only be resolved on the basis of speculation, as my colleagues agree. *Ante* at 690. In view of the grave and structural nature of the petitioners' claim, not to mention the fact that this is a capital case, which "magnifies the appearance of impropriety," (*ante* at 689), the petitioners are entitled to more from us.

My colleagues note that Bracy and Collins have long had access to some of the information that they profess an interest in exploring – the records of other trials over which Maloney presided, and the record of Maloney's own trial, for example – but have not pointed to anything that bolsters their claim of partiality. *Ante* at 691. But if petitioners can be faulted for not making the most of the available material, we can be faulted for being naive

about what the cold page of a trial record will reveal. A judge who wishes to be tough on the defendant need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. When he sold an acquittal, he wanted facts that he could hang his hat on (*e.g.*, Maloney Tr. 2571, 2669-70, 2682); and we have no reason to doubt that if he wanted to cultivate a pro-prosecution record to protect his interests as a bribe taker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge. Cases are fixed not in the courtroom but in bars, bathrooms, and back hallways. If there is evidence of the kind Bracy and Collins hope to find, it is in the hands of persons familiar with these venues of injustice. Both Maloney and his bagman McGee are continuing their version of "stand[ing] tall" (*see United States v. Maloney*, 71 F.3d at 651-52), but Swano, Robert Cooley, and others may have something material to say, and the U.S. Attorney may be of some help in identifying whom the petitioners should approach. But it is likely that no one is going to talk without a subpoena, and petitioners should not be deprived of that instrument.

We are venturing into a realm noir with which, I may say with confidence, none of us is on intimate terms. We cannot simply assume that "the probability is slight" that discovery will yield Bracy and Collins anything. *Ante* at 691. Let them try. If their discovery proves fruitless, we can at least take comfort in the knowledge that we have given them every opportunity to prove that Maloney's corruption deprived them of a fair trial. We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them

of the chance to render their theory anything more. I understand that Illinois has an interest in the finality of its judgments, and allowing the discovery that the petitioners seek would, if nothing else, portend a significant delay in the implementation of their death sentences. But having left Bracy and Collins to the mercies of a corrupt judge, the State should not be heard to complain in this matter. (In fact, its brief is utterly silent on this point.) The people of Illinois have as great an interest in the integrity of capital trials as Bracy and Collins do.

2.

My disagreement with the majority goes deeper than the question of discovery, however. In the end, I agree with Collins and Bracy that proof of the impact Maloney's corruption had, or probably had, on the petitioner's trial is unnecessary. We do not know, and we likely will never know, what Maloney thought about Bracy and Collins. But we have a pretty clear picture of how he viewed justice. The price tag may have varied, but as Maloney's conviction proves, justice was for sale in Maloney's courtroom to the defendants who could afford to pay, even when they were charged with the most heinous of crimes. That fact carries far more significance than the majority is willing to recognize. As this court acknowledged in *Del Vecchio*, in considering whether a biasing influence requires the disqualification of a judge, "we begin . . . by presuming 'the honesty and integrity of those serving as adjudicators.' " 31 F.3d at 1375 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975)). That presumption, as my colleagues acknowledge, is "obviously inapplicable here." *Ante* at

688. Maloney was not Louis Garippo, an esteemed and honest judge whose impartiality was argued to have been potentially compromised by his prior involvement with the defendant as a prosecutor. *See Del Vecchio*, 31 F.3d at 1375-80 (majority); *id.* at 1398 (Cummings, J., dissenting); *id.* at 1399 (Cudahy, J., dissenting); *id.* (Ripple, J., dissenting). Nor was he even Otto Kerner, a judge whose crimes pre-dated his service on the bench. *See United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 and *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974). Maloney was a criminal who, as a judge, transformed his very office into a racketeering enterprise.

Faced with the possibility of vacating numerous convictions obtained in Maloney's courtroom, we would like to believe that he was capable of the impartiality that the Fourteenth Amendment requires when no money changed hands. But how can we? Once he embarked on the path of bribe taking, Maloney had forsaken his judicial oath. Justice was a mere commodity to him, defendants nothing more than a profit center. His deviation from the path of righteousness was not, moreover, momentary and uncharacteristic; it was cold, calculated, and spanned a period of years, if not the entirety of his tenure on the bench. Thus, Maloney's "bias," if we can call it that, cannot be conveniently compartmentalized. *Cf. Diversified Numismatics, Inc. v. City of Orlando, Florida*, 949 F.2d 382, 385 (11th Cir.1991) (per curiam). We may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons a black robe, and hoodwinks everyone with a credible impersonation of Oliver

Wendell Holmes. Maloney's willingness to exchange money for the freedom of those charged with the most abhorrent crimes displayed his scorn for the very concept of justice.

By demanding proof that Maloney's corruption either had or likely had an identifiable impact on the petitioners' trial, we fail to come to grips both with the gravity of Maloney's offense and with the constitutional imperative that the accused be tried before a judge of integrity and impartiality. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.' " *Aetna*, 475 U.S. at 825, 106 S. Ct at 1587 (quoting *Murchison*, 349 U.S. at 136, 75 S.Ct. at 625). We said in *Del Vecchio* that "bad appearances alone [do not] require disqualification" (31 F.3d at 1372), but that an external influence requires the judge's disqualification when "the influence[ ] involved str[ikes] at the heart of human motivation, that an average man would find it difficult, if not impossible, to set the influence aside" (*id.* at 1373). My colleagues and I have been discussing Maloney's bribetaking as just another "bias" or "influence," something external to his personality, or at least some severable part of it, that at most "might" have given him the "incentive" to behave in a particular fashion on occasions when he was not bribed. But there is a more malevolent side to Maloney's offense that cannot be ignored. Maloney's bribetaking removes him from the category of the "average" man we addressed in *Del Vecchio*. We are speaking in this case about what motivates a *criminal*, and this implicates a far darker set of impulses than we confront in the usual bias case. The question we should be asking ourselves is not what impact the lack of a bribe

had on Maloney's decisionmaking in a particular case, but what his willingness to accept a bribe tells us about his view of judging. Maloney proved himself willing to acquit defendants charged with capital offenses for a few thousand dollars. The victims of those crimes, their families, the people of Illinois, the concept of justice, were apparently worth no more to him. Why should we assume that defendants were worth anything more to Maloney? How, in particular, can we trust Maloney to have treated a defendant fairly when that defendant had not offered him any money?[1] If due process means anything, I think we must assume that Maloney's corruption pervaded his work as a judge. The Supreme Court could not have put it more clearly: "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired."

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[1] Consider the words of a government attorney who prosecuted Maloney:

> As a judge [Maloney] was tough and hard-nosed. Many prosecutors liked working in his courtroom because he was tough and hard-nosed. But one of the things that I have heard over and over again from lawyers in the community is that he took it far too far; that he was ruthless; that he heartlessly meted out sentences without any compassion. [T]he only time there was compassion that we can see has to do with the times in which money was being passed.

United States v. Thomas J. Maloney and Robert McGee, No. 91 CR 477, Sentencing Tr. 559-60 (N.D.Ill. July 21, 1994) (remarks of Assistant United States Attorney Scott Mendeloff).

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986).[2]

Although Maloney's crimes reveal no fealty to his oath as a judge, my colleagues nonetheless refuse to relinquish the presumption that he acted fairly when not bribed. The notion that "a judge who accepts bribes in some cases is corrupt in all" is not "a sufficiently compelling empirical proposition," they say, to treat this case as if the government had bribed Maloney to convict the petitioners. *Ante* at 690. But this is not an empirical matter. We cannot assign a value of x to a judge's ability to be fair, divide it by y (y representing Maloney's bribe taking), and determine whether the result is less than the constitutionally minimal level of impartiality, z. Like so many other elements of our democracy, justice requires a leap of faith: faith that the defendant is in fact presumed

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[2] I recognize, of course, that there are prosecution-minded judges and defense-minded judges and that although these predispositions can have a very real impact on the kind of trial the parties receive, we ordinarily do not recognize this bias as a constitutional deprivation. *See ante* at 688; *see also Del Vecchio*, 31 F.3d at 1390-91 (Easterbrook, J., concurring). Judges are, after all, human beings, and we dare not fool ourselves into thinking that any judge can completely divorce herself from her own experiences and predilections. *Id.* at 1372 (majority); *see also* Benjamin N. Cardozo, The *Nature of the Judicial Process* 168-69 (Yale Univ. Press 1921). But the distinction between the honest judge, who labors to varying degrees of success to rise above his prejudices, and the dishonest judge, who willingly abandons his oath and yields to the coarsest of proclivities, cannot be overstated. We simply have no business assuming that a judge who is willing to acquit an accused murderer for a few thousand dollars will make any effort to protect the rights of a defendant who has not greased his palm.

innocent until proven guilty beyond a reasonable doubt; faith that the prosecutor and defense counsel alike will act as zealous advocates for their principals within the confines of law and ethics; faith that the trial judge will favor no party but will strive "to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532, 47 S.Ct. at 444. Maloney's crimes shatter that faith. We have no reason to believe that had Bracy and Collins possessed sufficient funds and willing attorneys, they could not have bought acquittals from Maloney. That alone suggests that Maloney's was not the court of "law" to which Bracy and Collins were entitled as the forum for their trial. We do have reason, based on Swano's testimony, to believe that Maloney's corruption extended beyond the cases in which he accepted a bribe, and that Maloney saw unfixed cases as an opportunity to "screw" the defendant and thereby further his own ends as a bribe taker. No "empirical" proof is necessary to demonstrate that the petitioners did not stand equal before the law in Maloney's courtroom.

I realize, of course, that Bracy and Collins were convicted by a jury, not by Maloney. Jurors have minds of their own; they can and do defy the expectations of the judge. That is but one reason that the jury has been viewed by some as "the very palladium of free government." *The Federalist* No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *see Duncan v. Louisiana*, 391 U.S. 145, 155-58, 88 S.Ct. 1444, 1451-52, 20 L.Ed.2d 491 (1968). But we cannot ignore the influence that the judge retains even in a jury trial. *See Walker v. Lockhart*, 726 F.2d 1238, 1259 (8th Cir.1984) (en banc) (Bright, J., dissenting), *cert. dismissed*, 468 U.S. 1222, 105 S.Ct. 17, 82 L.Ed.2d 912

(1984), and *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986). I do not refer so much to the ability of the judge to communicate his opinions to the jury through raised eyebrows, choice bits of sarcasm, and questioning of the witnesses that strays into advocacy, although this happens. *E.g., Dellinger*, 472 F.2d at 386-88; *see also United States v. Filani*, 74 F.3d 378, 387 (2d Cir.1996); *Bufford v. Rowan Cos.*, 994 F.2d 155, 159 (5th Cir.1993). I mean the extraordinary ability of the trial judge to shape the trial itself. It is she who decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury. Thus, even when the verdict is not entrusted to her, a partial judge retains great influence, if not directly upon the jury, then upon the myriad events that culminate in the jury's decision. *See Tyson v. Trigg*, 50 F.3d 436, 439 (7th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 697, 133 L.Ed.2d 655 (1996).[3]

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[3] In this case there were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the petitioners' motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses; improper prosecution argument to the jury; the denial of a continuance prior to the sentencing hearing; and the refusal to sever the sentencing hearings. Viewed singly, none of Maloney's rulings on these issues may seem critical to the outcome of the case; but as my colleagues concede, the cumulative effect of these rulings may be "greater than we imagine." *Ante* at 690 (citing *Tyson*, 50 F.3d at 439).

Our own ability to monitor the influence of the trial judge, and to discern the taint of partiality, is narrowly circumscribed. Appellate review of the mundane decisions that can make or break a party's case (the exclusion or admission of a key piece of evidence, for example) typically is quite limited. *E.g., United States v. Marshall*, 75 F.3d 1097, 1109 (7th Cir.1996) (evidentiary issues); *United States v. Pulido*, 69 F.3d 192, 204 (7th Cir.1995) (limitations on cross-examination); *United States v. Fish*, 34 F.3d 488, 495 (7th Cir.1994) (request for continuance); *United States v. $94,000.00 in U.S. Currency*, 2 F.3d 778, 788 (7th Cir.1993) (questions posed on voir dire). In the rare instance that we find error, it is more often than not deemed harmless. *E.g., Jones v. Page*, 76 F.3d 831, 855-56 (7th Cir.1996). Even errors of constitutional dimension may be labelled benign on review. *Tyson*, 50 F.3d at 446-47. Theoretically, we could require a more searching review of the record when there is evidence that the trial judge was corrupt, but we would be fooling ourselves to think that even our best efforts would suffice to expose the ways in which the judge's criminal behavior may have tainted the trial. *See United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir.1967) ("Few claims are more difficult to resolve than the claim that the trial judge, presiding over a jury trial, has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one."), *cert. denied*, 400 U.S. 820, 91 S.Ct. 38, 27 L.Ed.2d 48 (1970). So much goes on in the courtroom that the written record can never reveal. Why else do we routinely grant so much deference to the trial judge, who sees and hears the witnesses first hand, who supervises the trial from start to finish, who can best

gauge the impact of any development upon the jury before him? Our acquiescence in the decisions of the trial court is dictated as much by pragmatism as by principle.

It is no answer to the charge of corruption that Maloney's discretionary rulings on their face appear to fall within the realm of reason. *See ante* at 690. All that means is that a reasonable judge might have rendered the same rulings. But we assume that the reasonable judge does not act for malignant ends, that she exercises

> a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just.

Davis v. Boston Elevated Ry. Co., 235 Mass. 482, 126 N.E. 841, 844 (1920); *see also* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 784 (1982) ("discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles" '") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.Va.1807) (No. 14,692d) (Marshall, C.J.)). If, on the other hand, a judge exercises her discretion for invidious reasons, she has exceeded her authority. *See* 1 Steven Alan Childress and Martha S. Davis, FEDERAL STANDARDS OF REVIEW, § 4.01 at 4-2 through 4-3 (2d ed. 1991); *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir.1966) (Friendly, J.). But, except in the rare case in which the judge's agenda is obvious, we cannot expect to autopsy a trial and find evidence that the cancer of the judge's

corruption has invaded her decisionmaking. When the majority finds it "unlikely" that the discretionary trial rulings of which Bracy and Collins complain were the product of Maloney's corruption (*ante* at 690), it is doing exactly what the petitioners are faulted for doing: speculating.

We cannot, therefore, hide behind the jury's verdict. We simply cannot know what impact Maloney's corruption may have had on the trial and on the jury's decision. *Cf. Vasquez*, 474 U.S. at 260-64, 106 S.Ct. at 622-24 (discrimination in grand jury not rendered harmless by subsequent trial). The evidence against Bracy and Collins may seem to us overwhelming, but that does not strip them of their right to due process. "No matter what the evidence was against [them], [they] had the right to have an impartial judge." *Tumey*, 273 U.S. at 535, 47 S.Ct. at 445. Nor, as a matter of principle, can the process of presumably unbiased appellate review cure the taint of Maloney's corruption; Bracy and Collins were "entitled to a neutral and detached judge in the first instance." *Ward*, 409 U.S. at 61-62, 93 S.Ct. at 84.

Ultimately, although my colleagues concede the plausibility of the notion that a judge's corruption cannot be confined to the cases in which he accepts a bribe, they decline to embrace it, finding the consequences "unacceptable." *Ante* at 689. Maloney alone presided over some 6,000 cases. *See United States v. Thomas J. Maloney and Robert McGee*, No. 91 CR 477, 1994 WL 96673, Sentencing Tr. 571 (N.D.Ill. July 21, 1994). My colleagues believe, and perhaps rightly so, that we cannot vacate the convictions of Bracy and Collins without calling into doubt the many other judgments entered not only by Maloney (the only

Illinois judge thus far convicted of corruption in murder prosecutions), but also the seventeen other Cook County judges found guilty of taking bribes. *Ante* at 689. Given the expanse of time that has passed since these judgments were entered, were retrials ordered across the board, there are doubtless many guilty individuals, murderers even, who would go free. It is an appalling prospect. But we must not allow ourselves to become paralyzed by the possibilities. We decide today not the validity of every judgment ever rendered by a corrupt judge, but the fate of two individuals who are about to pay the ultimate criminal penalty without having been afforded the most basic rudiment of due process. What are we to say to Bracy and Collins, that they had the right to an honest, impartial judge but that the breadth of past corruption in the Illinois judiciary makes it too costly for us to enforce that right? Are they to become the latest victims of Maloney's bribe taking, and we his accomplices after the fact? The Constitution was not written for easy cases and likeable defendants, and we are sworn to uphold it no matter what the result. Knowing full well the perils that may confront us if we insist that defendants be given trials before honest judges, I believe we have no choice but to take the first step down that path here. We cannot turn our backs on the Constitution, especially when the petitioners' very lives are at stake. If nothing else, "[d]eath is factually different. Death is final. Death is irremediable. Death is unknowable." Anthony G. Amsterdam, Tr. of oral argument, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (No. 74-6257), quoted in MAY IT PLEASE THE COURT . . . 233 (Peter Irons & Stephanie Guitton eds. 1993); *see also Furman v. Georgia*,

408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

3.

The quality of justice we can claim to have achieved in this nation is not measured by what our best judges can do but by what the worst of our judges have done. Today we say that Thomas Maloney's handiwork is good enough. An Illinois defendant, it appears, is entitled to appear before a judge who is not under *indictment* for bribery, Ill. S.Ct. R. 56(a)(1), but today's opinion deprives him of the right to appear before a judge who is not *engaged* in bribery. Bracy and Collins will thus have to be content with the judgment of a criminal. I do not know which I find more shocking: the base quality of justice that Bracy and Collins received in the Illinois courts, or our holding today that the Constitution requires no more.

4.

I must, finally, say a word about the majority's invocation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Ante* at 689. *Teague* generally bars the application of "new rules" of federal law on habeas review. But *Teague's* proscription is not jurisdictional, *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990), and if the state fails to invoke *Teague*, we may, but are not compelled, to do so ourselves, *Goeke v. Branch*, ___ U.S. ___, ___, 115 S.Ct. 1275, 1276, 131 L.Ed.2d 152 (1995) (per curiam). *See Stewart v. Lane*, 60 F.3d 296, 304-05 (7th Cir.1995) (Ripple, J., concurring), *supplemented on reh'g*, 70 F.3d 955, *petition for cert. filed*

(Jan. 16, 1996) (No. 95-7444). The state has never cited *Teague* as a defense to the petitioners' claim of judicial corruption, and I am not convinced that the circumstances of this case warrant our sua sponte reliance upon it as an alternate basis for denying the petitioners the relief they seek. *See Stewart* at 304 (concurrence) ("Because, in a capital case, invocation of *Teague* can often mean the difference between life and death for the petitioner, we need to be particularly circumspect as to when we shall invoke *Teague* sua sponte."). The majority offers no reason why *Teague* is particularly apposite here, and I discern none. Since when is it news that the accused has the right to be tried before an honest, impartial judge? I had rather thought that to be a cornerstone of our system of justice. And indeed, Supreme Court precedent reveals the notion to be anything but novel. The Court's 1927 decision in *Tumey*, for example, holds that when a judge has a financial incentive to see the defendant convicted, he is not sufficiently impartial for constitutional purposes. 273 U.S. at 531-35, 47 S.Ct. at 444-45. This case is, in a real sense, but a factual variant of *Tumey*. I grant that no court has yet found it necessary to hold that a judge engaged in serial bribetaking is not the impartial adjudicator that the Constitution requires, and in that respect one might argue that the rule the petitioners posit "was not *dictated* by precedent existing at the time [their] conviction[s] became final." *Caspari v. Bohlen*, ___ U.S. ___, ___, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070) (emphasis in *Teague*). But surely common sense counts for something in the *Teague* analysis. The Greylord prosecutions had not yet taken place in 1981 when Bracy and Collins were

tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison, not on the bench. There is, in short, nothing surprising in the petitioners' claim. The prospect of retrying Bracy and Collins (not to mention other defendants convicted by or before Maloney) is an onerous one for the State, but that burden has nothing to do with the novelty of the principle that a defendant is entitled to a judge who is not on the take. Our invocation of *Teague* in this circumstance makes that precedent look less like a shield protecting the State from the retroactive application of new rules than a sword depriving habeas petitioners of constitutional rights that have long been recognized.

5.

Eighteen judges of the Cook County Circuit Court have been convicted of corruption in the last decade. We would like to think that rampant corruption on the Cook County bench is a relic of the past. But it will not be, it cannot be, so long as we refuse to recognize just how fundamentally at odds this corruption is with the constitutional guarantee of due process. Like Terrence Hake, who risked his own career to expose the criminals clothed in the robes of judges, we too have a role to play in restoring integrity to the bench. We cannot embrace the judicial services of outlaws without deepening the stain their crimes have already left on our courts.

I respectfully dissent.

96-6133 BRACY, WILLIAM V. GRAMLEY, WARDEN

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to the following question: Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to a trial before an impartial judge. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply.

96-6298 LINDH, AARON V. MURPHY, WARDEN

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply.
